Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

CHARLES W. TURNBAUGH in his official capacity as Commissioner of Financial Regulation, Maryland Department of Labor, Licensing and Regulation,

Petitioner,

v.

NATIONAL CITY BANK OF INDIANA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves the same question of law that is now pending before this Court in *Watters v. Wachovia Bank, N.A.*, No. 05-1342.

12 U.S.C. § 484(a) of the National Bank Act limits visitorial powers over "national banks" except as authorized by federal law. National banks are defined and created under the National Bank Act. State-chartered nonbank operating subsidiaries of national banks are created under state corporate law. The federal Office of the Comptroller of the Currency ("OCC"), through regulations such as 12 C.F.R. § 7.4006, purported to make 12 U.S.C. § 484(a) equally applicable to state-chartered nonbank subsidiaries of national banks, and thus claimed visitorial and regulatory control over such subsidiaries to the exclusion of state regulators.

In the absence of express or implied congressional intent to preempt the States' longstanding regulation of state-chartered nonbank mortgage lenders, are the OCC regulations purporting to preempt state law authorized by the National Bank Act and entitled to judicial deference under *Chevron USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984)?

PARTIES TO THE PROCEEDING

The petitioner is Charles W. Turnbaugh, Commissioner of Financial Regulation, Maryland Department of Labor, Licensing and Regulation, who was the defendant in the district court and the appellant in the court of appeals. The respondents are National City Bank of Indiana, a federally chartered national bank, and its state-chartered operating subsidiaries National City Mortgage Company, an Ohio corporation, and First Franklin Financial Corporation, a Delaware corporation, which were the plaintiffs in the district court and the appellees in the court of appeals.

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No. ____

IN THE
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CHARLES W. TURNBAUGH,
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NATIONAL CITY BANK OF INDIANA, *et al.*,
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On Petition For A Writ Of Certiorari
To The Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Charles W. Turnbaugh, Commissioner of Financial Regulation, Maryland Department of Labor, Licensing and Regulation, petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The August 10, 2006, opinion of the United States Court of Appeals for the Fourth Circuit is reported at *National City Bank of Indiana v. Charles W. Turnbaugh*, 463 F.3d 325 (4th Cir. 2006), and is reprinted in the Appendix ("App.") at 1-13.

The opinion of the United States District Court, Northern District of Maryland, is reported at *National City Bank of Indiana v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005), and is reprinted at App. 14-44.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2006. This petition is filed within 90 days of that judgment pursuant to Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves a preemption challenge to provisions of the Maryland Mortgage Lender Law found in Title 11, Subtitle 5 of the Financial Institutions Article, Annotated Code of Maryland, and the limitations on prepayment penalties set forth in § 12-105(b)(4) of the Commercial Law Article, Annotated Code of Maryland, as well as implementing regulations. The text of these provisions is reproduced at App. 45-51.

The following provisions of federal law are involved:

U.S. Const., Art. VI, cl. 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the

Contrary notwithstanding.

12 U.S.C. § 24 (Seventh) (in pertinent part):

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power –
>
> * * *
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking.

12 U.S.C. § 371(a):

> Any national banking associations may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

12 U.S.C. § 484(a):

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or

by either House thereof or by any committee of Congress or of either House duly authorized.

12 C.F.R. § 7.4006:

> Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.

12 C.F.R. § 34.21(a):

> Authorization. A national bank and its subsidiaries may make, sell, purchase, participate in, or otherwise deal in ARM loans and interests therein without regard to any State law limitations on those activities.

12 C.F.R. § 34.23 (in pertinent part):

> A national bank offering or purchasing ARM loans may impose fees for prepayments notwithstanding any State limitations to the contrary.

STATEMENT OF THE CASE

In August of 2004, the plaintiffs, National City Bank of Indiana ("National City Bank"), and two of its state-chartered operating subsidiaries, National City Mortgage Company ("National City Mortgage") and First Franklin Financial Corporation ("First Franklin"), filed a complaint for declaratory and injunctive relief asserting that the Maryland Commissioner of Financial Regulation was preempted from enforcing Maryland's mortgage lending

laws against the two subsidiaries. The complaint invoked the district court's federal question jurisdiction under 28 U.S.C. § 1331.

In an amended memorandum opinion issued on May 5, 2005, the district court ruled that the Maryland mortgage lending laws were preempted as they applied to the plaintiffs. App. 14-44. The court of appeals subsequently affirmed. App. 1-13.

The decisions below invalidated the Commissioner's regulatory and visitorial authority under the Maryland Mortgage Lender Law ("MMLL" or the "Act") which was enacted in 1989[1] and codified as Title 11, Subtitle 5 of the Financial Institutions Article ("Fin. Inst."), Annotated Code of Maryland ("Md. Code Ann."). The MMLL

---

[1] Prior to enactment of the MMLL, lenders who engaged in first mortgage lending or brokering were required to be licensed by the then State Bank Commissioner under the Mortgage Bankers and Mortgage Brokers law (formerly Title 12, Subtitle 5 of the Financial Institutions Article, repealed by Acts of 1989, Chapter 476). Similarly, lenders who engaged in secondary mortgage lending were subject to the regulatory jurisdiction of the then Commissioner of Consumer Credit under the Secondary Mortgage Loans -- Licensing Provisions (formerly Title 12, Subtitle 3 of the Financial Institutions Article, repealed by Acts of 1989, Chapter 476). Like the MMLL, both of these predecessor laws exempted national banks from coverage, but did not exempt subsidiaries such as National City Mortgage and First Franklin.

provides a comprehensive regulatory framework for residential mortgage lending that includes the licensing and bonding of mortgage lenders, with general regulatory oversight by the Commissioner. Pursuant to his statutory authority under the MMLL, the Commissioner has promulgated regulations to further the objectives of the Act. *See* Code of Maryland Regulations ("COMAR") 09.03.06.01 *et seq.* All of these measures assure the protection of Maryland consumers in these financially significant transactions, which involve the most local of interests: the purchase and funding of private residences.

Under Md. Code Ann., Fin. Inst. § 11-504, a person may not act as a mortgage lender in Maryland unless that person is licensed or exempted from licensing. National banks, such as National City Bank, are specifically exempt from the provisions of the MMLL. Md. Code Ann., Fin. Inst. § 11-502(b)(1). If a national bank is headquartered in Maryland or maintains at least one deposit-taking branch in Maryland (which National City Bank does not), then subsidiaries and affiliates of the national bank are also exempt from the provisions of the MMLL, pursuant to a 1997 amendment of the Act. Md. Code Ann., Fin. Inst. §§ 11-502(b)(11) and (c) (1997 Md. Laws, Ch. 588). In recognition of the exemption for national banks, the Commissioner has not attempted to exert regulatory authority over any national bank. However, state-chartered nonbank subsidiary corporations, such as National City Mortgage and First Franklin, are not exempt from the MMLL because they are not national banks, and their parent corporation, National City Bank, does not have a principal office in Maryland, nor does it have a branch that

accepts deposits in Maryland.

In addition to the licensing requirements under the MMLL, a licensee must secure a bond (up to a maximum of $375,000), the purpose of which is to protect "any mortgage loan borrower who has been damaged by a violation committed by a licensee of any law or regulation governing the activities of mortgage lenders." Md. Code Ann., Fin. Inst. § 11-508. To further protect Maryland consumers, pursuant to Md. Code Ann., Fin. Inst. § 11-511.1, all licensees must comply with continuing education requirements established by the Commissioner. *See* COMAR 09.03.06.17.

The Commissioner regulates the industry by performing routine periodic examinations of licensees and investigating individual complaints. If the Commissioner determines that there is a violation of the Act or regulations, he may take disciplinary action against a licensee, including any combination of the following: issue a cease and desist order; suspend or revoke a license; assess a fine; or issue an order to pay restitution to the consumer. Md. Code Ann., Fin. Inst. §11-517. The MMLL also provides for criminal sanctions under certain circumstances. Md. Code Ann., Fin. Inst. §11-523.

Under Md. Code Ann., Fin. Inst. §11-517(a)(4), a licensee may be sanctioned if it "[v]iolates any provision of this subtitle or any rule or regulation adopted under it or any other law regulating mortgage loan lending in the State. . . ." One such law is the provision at issue here, Md. Code Ann., Commercial Law ("Com. Law") §12-105(b)(4), which provides that a lender may charge a

prepayment penalty only in the following circumstances:

> (4) A prepayment charge or penalty on a prepayment of the unpaid principal balance of the loan, if the loan is secured by a home, by a combination of home and business property, or by agricultural property, or if the loan is a commercial loan not in excess of $5,000, provided that the charge or penalty:
>
> (i) May be imposed only on prepayments made within three years from the date the loan is made; and
>
> (ii) May not exceed an amount equal to two months' advance interest on the aggregate amount of all prepayments made in any 12-month period in excess of one third the amount of the original loan.

This provision regulating prepayment penalties applies to all licensed mortgage lenders in Maryland. It also applies to any conventional fixed rate mortgage or adjustable rate mortgage ("ARM").

Plaintiffs National City Mortgage and First Franklin are distinct state-chartered corporate entities, which are not themselves national banks. Each of them has a significant history of being regulated by Maryland and other States over a number of years. Nonetheless, the cor. plaint in this matter asserted that due to their relationship with a national bank, National City Mortgage and First Franklin should be treated differently from all other state-chartered nonbank mortgage lenders licensed to make mortgage loans in

Maryland and should be exempt from the Commissioner's regulatory authority. In accepting the plaintiffs' argument, the courts below disregarded the Commissioner's longstanding concurrent power to regulate state-chartered subsidiaries of national banks and invalidated the State's reasonable restriction on prepayment fees, which was enacted by the Maryland Legislature as a protection for Maryland borrowers.

As of November 30, 2004, there were 4,162 mortgage lender licenses issued and outstanding in Maryland. App. 55. Of these, at least 124 licenses had been issued to subsidiaries or affiliates of national banks that are not statutorily exempt from licensing requirements. *Id.*

Both National City Mortgage and First Franklin have a substantial licensing history with the State of Maryland. National City Mortgage was incorporated in Ohio, has its principal place of business in Ohio, and has been qualified as a foreign corporation to do business in Maryland since 1982. App. 54. It was first licensed in Maryland under the MMLL in June of 1989, and as of December 2004, it had 62 separate licenses to do mortgage lending in Maryland, plus four licenses for various partnerships in which National City Mortgage had interests. App. 52-53. Each of these licenses was scheduled to expire on December 31, 2005. App. 53. As of December 2004, National City Mortgage had 30 locations in Maryland and 32 out-of-state locations that did business in Maryland. *Id.* Prior to the litigation in this matter, the Commissioner's staff had performed numerous examinations of the books and records of National City Mortgage at various locations to

assure compliance with the MMLL, and it responded to approximately 20 consumer complaints over a four year period. App. 53-54. In not one of these instances did National City Bank or National City Mortgage object to the Commissioner's exercise of his visitorial or regulatory power. App. 54.

First Franklin was incorporated in Delaware, has its principal place of business in San Jose, California, and has been qualified as a foreign corporation to do business in Maryland since 1993. App. 55. First Franklin was licensed to do mortgage lending from 12 locations (three of them in Maryland) from 1994 through December 31, 2003. App. 53. It did not renew any of its licenses at the end of 2003, and when this litigation began it was not licensed to do business in Maryland as a mortgage lender. *Id.* The records of the Commissioner indicate that in 2000, 2002, and 2003, there were examinations of two First Franklin locations. App. 54. Up until the time just prior to this litigation, neither National City Bank nor First Franklin objected to the Commissioner's exercise of his visitorial power. Moreover, the record contains no indication that the OCC ever exercised visitorial power over National City Mortgage or First Franklin.

The controversy between the parties arose as a result of two consumer complaints filed against First Franklin in June and July of 2004 regarding the assessment of prepayment fees. The first instance was resolved by First Franklin voluntarily forgoing the prepayment fees. In the second instance, however, First Franklin insisted on its right to collect the fees, which were not permitted under

Md. Code Ann., Com. Law § 12-105(b)(4).

To prevent any further action by the Commissioner, National City Bank filed a complaint for declaratory and injunctive relief with the district court on or about August 20, 2004. Upon cross motions for summary judgment, the district court issued its decision declaring the Maryland mortgage lending laws invalid as they applied to National City Mortgage and First Franklin and permanently enjoining the State from enforcing the laws as to them. The Commissioner appealed to the Fourth Circuit, which affirmed.

In its decision, the court of appeals rejected the "presumption against preemption in fields the states traditionally regulate," which "Courts generally apply," App. 8 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), on the ground that "'an 'assumption' of nonpre-emption is not triggered when [a] State regulates in an area where there has been a history of significant federal presence.'" App. 8 (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)). The court of appeals did not explain how that exception to the presumption against preemption could apply to the area of state-chartered nonbank mortgage lenders, which the States had traditionally regulated but the federal government had not. Relying upon *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the court of appeals acknowledged that "Congress has not spoken directly about whether the OCC has the authority to regulate operating subsidiaries," App. 10, but held that the OCC did not exceed its authority in doing so because "the OCC's

interpretation of 12 U.S.C. § 24 Seventh," which pertains to the incidental powers of a national bank, "is reasonable and therefore is permissible," App. 12. The court of appeals also held "that 12 C.F.R. § 7.4006, which provides that state laws must apply to operating subsidiaries to the same extent that state laws apply to parent national banks, is reasonable and within the OCC's delegated authority," because "[i]f state law applied to operating subsidiaries to a greater extent than it applied to their parent national banks, it would frustrate national banks' right to conduct the 'business of banking' through operating subsidiaries." *Id.*

REASONS FOR GRANTING THE PETITION

On June 19, 2006, this Court granted review in *Watters v. Wachovia Bank, N.A.*, No. 05-1342, to decide the same issue presented in this case: whether the OCC has statutory authority to regulate state-chartered nonbank mortgage lenders to the exclusion of State regulators. The Court has also held the petition filed in another case involving the same issue, pending the Court's decision in *Watters*. *See Burke v. Wachovia Bank, N.A.* , No. 05-431. All three of these cases address whether the National Bank Act authorizes the OCC's issuance of preemptive regulations, most notably 12 C.F.R. § 7.4006, which purports to preempt and abrogate all state regulation of entities that are neither national banks nor federally chartered corporations. Moreover, all three cases involve court of appeals decisions which reject the presumption against preemption and accord *Chevron* deference to the OCC's own declaration of the preemptive effect of its

regulations. Accordingly, this Court's decision in *Watters* will likely control the resolution of the question presented in this case.

Therefore, this petition should be held pending the Court's decision in *Watters v. Wachovia Bank, N.A.*, No. 05-1342.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Watters v. Wachovia Bank, N.A.*, No. 05-1342, and disposed of in accordance with the Court's decision in that case.

Respectfully submitted,

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463 F.3d 325

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL CITY BANK OF INDIANA; NATIONAL CITY MORTGAGE COMPANY; FIRST FRANKLIN FINANCIAL CORPORATION,

Plaintiffs-Appellees,

v.

CHARLES W. TURNBAUGH, in his official capacity as Commissioner of Financial Regulation, Maryland Department of Labor, Licensing and Regulation,

Defendant-Appellant.

No. 05-1647

THE STATES OF ALASKA; ARIZONA; ARKANSAS; COLORADO; CONNECTICUT; DELAWARE; FLORIDA; HAWAII; IDAHO; ILLINOIS; IOWA; KANSAS; KENTUCKY; LOUISIANA; MAINE; MASSACHUSETTS; MICHIGAN; MINNESOTA; MISSISSIPPI; MISSOURI; MONTANA; NEVADA; NEW HAMPSHIRE; NEW JERSEY; NEW YORK; NORTH CAROLINA; NORTH DAKOTA; OKLAHOMA; OREGON; PENNSYLVANIA; SOUTH CAROLINA; SOUTH DAKOTA; TENNESSEE; TEXAS; VERMONT; WASHINGTON; WEST VIRGINIA; WISCONSIN; WYOMING; THE DISTRICT OF COLUMBIA,

Amici Supporting Appellant,

THE OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Amicus Supporting Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Catherine C. Blake, District Judge.
(CA-04-2719-CCB)

Argued: May 25, 2006

Decided: August 10, 2006

Before WIDENER and DUNCAN, Circuit Judges,
and Joseph R. GOODWIN, United States
District Judge for the Southern District of
West Virginia, sitting by designation.

Affirmed by published opinion. Judge Goodwin wrote the opinion, in which Judge Widener and Judge Duncan joined.

COUNSEL

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DEPARTMENT OF JUSTICE, Raleigh, North Carolina; Thomas J. Miller, Attorney General of Iowa, William L. Brauch, Special Assistant Attorney General, Consumer Protection Division, IOWA ATTORNEY GENERAL'S OFFICE, Des Moines, Iowa, for Amici Supporting Appellant. Julie L. Williams, Daniel P. Stipano, Horace G. Sneed, OFFICE OF THE COMPTROLLER OF THE CURRENCY, WASHINGTON, D.C., for Amicus Supporting Appellees.

OPINION

GOODWIN, District Judge:

The issue before us is whether the National Bank Act ("NBA"), 12 U.S.C. §§ 21-216 (2000), and regulations of the Office of the Comptroller of the Currency ("OCC") preempt Maryland laws requiring the State's Commissioner of Financial Regulation ("Commissioner") to exercise certain powers over operating subsidiaries of a national bank. We agree with the district court that the Maryland laws are preempted and affirm.

I.

This dispute arose when the Commissioner, acting pursuant to Maryland law, attempted to exercise visitorial powers and to limit prepayment penalties on adjustable rate mortgage ("ARM") loans originated by operating subsidiaries of a national bank.[1]

---

[1] Maryland law requires the operating subsidiaries to submit to the Commissioner's visitorial powers, Md. Code Ann., Fin. Inst. §§ 11-504 to -515 (West 2006), and establishes a prepayment restriction on

(Continued on following page)

National City Bank of Indiana wholly owns and operates National City Mortgage Company and First Franklin Financial Corporation as operating subsidiaries. National City Mortgage and First Franklin both previously engaged in residential lending in Maryland.[2]

The Maryland Mortgage Lender Law ("MMLL"), Md. Code Ann., Fin. Inst. §§ 11-501 to -524 (West 2006), enacted in 1989, provides Maryland's regulatory framework for residential lending. The MMLL grants the Commissioner the authority to exercise visitorial powers over mortgage lenders and to adopt rules and regulations to carry out the provisions of the MMLL. *Id.* §§ 11-503 to -515. In a separate statute, Maryland law gives the Commissioner authority to restrict pre-payment penalties on ARM loans. *Id.*, Com. Law § 12-105(b).

In June and July 2004, two consumers filed complaints with the Commissioner contesting prepayment penalties assessed by First Franklin. After the Commissioner notified First Franklin of the complaints, National City Bank and its operating subsidiaries filed an action for declaratory and injunctive relief to prevent the Commissioner's enforcement. The bank claimed that the regulations promulgated by the OCC under the NBA exempt the

---

ARM loans, *Id.*, Com. Law § 12-105(b). "Visitation" includes examination of bank records, regulation and supervision of banking activities, and enforcement of laws. 12 C.F.R. § 7.4000(a)(2) (2006).

[2] Neither operating subsidiary presently originates mortgage loans in Maryland. The district court correctly ruled, however, that the case is not moot because the Commissioner still seeks to exert visitorial authority over First Franklin and National City Mortgage for mortgage loans they originated previously, and the Commissioner may attempt to exercise visitorial authority over other National City Bank operating subsidiaries.

bank's wholly-owned subsidiaries, to the same extent that it exempts the bank itself, from state regulation of its banking activities. Because the OCC regulations are valid exercises of the agency's congressionally delegated authority, the bank argued, they preempt the conflicting Maryland law. The parties filed cross-motions for summary judgment. The district court granted the plaintiffs' summary judgment motion, denied the defendant's motion, and permanently enjoined the Commissioner from enforcing the Maryland laws against the operating subsidiaries.

II.

We review a grant of summary judgment *de novo*, viewing the facts in the light most favorable to the nonmoving party. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001). A moving party is entitled to summary judgment if the evidence shows that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The parties agree that this case involves only legal issues and that there are no disputed facts.

III.

We first summarize the relevant federal statutory and regulatory framework and then consider preemption.

A.

Congress enacted the NBA in 1864 "to facilitate . . . a 'national banking system.'" *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978) (quoting Cong. Globe, 38th Cong., 1st Sess.,

1451 (1864)). In relevant part, the NBA establishes nationally chartered banks and vests these banks with certain powers. 12 U.S.C. § 24.

The OCC has the "primary responsibility for surveillance of the 'business of banking' authorized by [the NBA]." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 256 (1995). To carry out this responsibility, the OCC promulgates regulations and defines the "'incidental powers' of national banks beyond those specifically enumerated in the statute." *Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 312 (2d Cir. 2005); *see also* 12 U.S.C. § 93a (authorizing the OCC "to prescribe rules and regulations to carry out the responsibilities of the office").

Our analysis focuses on three federal statutes and the regulations issued by the OCC to enforce them. First, Congress gives national banks general authority to "exercise all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24. In furtherance of this statute, the OCC allows national banks to conduct "business of banking" activities through operating subsidiaries. 12 C.F.R. § 5.34(e)(1).

Second, Congress specifies that national banks may engage in residential lending as regulated by the OCC. 12 U.S.C. § 371(a). Under this section, the OCC provides that national banks and subsidiaries may deal in ARM loans "without regard to any State law limitations on those activities." 12 C.F.R. § 34.21(a). The OCC also provides that "[a] national bank offering or purchasing ARM loans may impose fees for prepayments notwithstanding any State law limitations to the contrary." *Id.* § 34.23.

Third, "No national bank shall be subject to any visitorial powers except as authorized by federal law. . . ."

12 U.S.C. § 484(a). Pursuant to this section and other sections, the OCC issued 12 C.F.R. § 7.4006, which states, "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

B.

When the federal government acts within the scope of its authority, federal law preempts inconsistent state law. *M'Culloch v. Maryland,* 4 Wheat. 316, 17 U.S. 316, 436 (1819).[3] To determine whether preemption exists, courts look to congressional intent. *Fid. Fed. Sav. & Loan Assoc. v. de la Cuesta,* 458 U.S. 141, 152 (1982). Preemption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977).

The Commissioner contends the OCC exceeded its delegated authority by promulgating regulations that limit a state's power to regulate national banks' operating subsidiaries. The Commissioner claims that a presumption against preemption exists and therefore the OCC's regulations do not preempt the Maryland laws. The district court found that a presumption against preemption does not exist, the Maryland statutes conflict with federal law, and

[3] "Federal regulations have no less pre-emptive effect than federal statutes." *Fid. Fed. Sav. & Loan Ass'n. v. de la Cuesta,* 458 U.S. 141, 153 (1982).

the regulations are entitled to *Chevron* deference.[4] The district court accordingly found that federal law preempts the Maryland statutes. We agree.

1.

The Commissioner claims that the extensive history of state regulation of non-bank, state-chartered mortgage subsidiaries creates a presumption against preemption. Courts generally apply a presumption against preemption in fields the states traditionally regulate. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). However, "an 'assumption' of nonpre-emption is not triggered when [a] State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (citing *Rice*, 331 U.S. at 230). The regulation of federally chartered banks is indisputably such an area. *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 n.3 (6th Cir. 2005); *Bank of Am. v. San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) ("Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, . . . creating an extensive federal statutory and regulatory scheme."). Further, the "grants of both enumerated and incidental powers to national banks" are "not normally limited by, but rather *ordinarily pre-empt* [], contrary state law." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (emphasis added). The pertinent regulations define the scope of the national banks' authority to conduct business through operating subsidiaries; undoubtedly these issues involve the "incidental powers" of

[4] The district court also applied a separate analysis that considered only the reasoning and holding of *de la Cuesta*. The court concluded the regulations were valid under either analysis.

national banks. A presumption against preemption, therefore, does not exist.

2.

We now turn to whether conflict preemption exists. Our first step in a conflict preemption analysis is to determine whether a conflict exists between the federal and state laws. *College Loan Corp. v. SLM Corp.,* 396 F.3d 588, 595-96 (4th Cir. 2005) (explaining that conflict preemption exists when a state law conflicts with federal law). The parties agree that the Maryland banking laws conflict with the OCC regulations. This case therefore involves conflict preemption unless the OCC "exceeded its authority or acted arbitrarily." *See de la Cuesta,* 458 U.S. at 153-54 (finding an administrator's "judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily").

3.

The framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), determines whether the OCC exceeded its authority or acted arbitrarily. *Wells Fargo Bank N.A. v. Boutris,* 419 F.3d 949, 958 (9th Cir. 2005); *Wachovia Bank v. Burke,* 414 F.3d at 315; *Wachovia Bank v. Watters,* 431 F.3d at 560.

Two questions control the *Chevron* analysis. First, "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. If Congress's intent is clear, "that is the end of the matter. . . . [But] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of

the statute." *Id.* at 842-43. If there is ambiguity, we "give great weight to any reasonable construction" of the statute. *Clarke v. Secs. Indus. Ass'n,* 479 U.S. 388, 403 (1987).

i.

Congress has not spoken directly about whether the OCC has the authority to regulate operating subsidiaries. The Commissioner claims Congress's omission of references to "non-bank state-chartered" entities in the NBA is evidence that regulation of operating subsidiaries is beyond the scope of the OCC's authority. The Ninth Circuit in *Wells Fargo* succinctly explains why the Commissioner's argument fails:

> While this silence might have been significant to the court were it to interpret the statute *de novo,* it does not answer the question asked by the first step of *Chevron* – namely, whether Congress has "unambiguously expressed [its] intent." We agree. The absence of any reference to operating subsidiaries in the Bank Act does not unambiguously provide that national banks may not create and perform banking functions through such entities.

Wells Fargo, 419 F.3d at 959 n.12 (quoting *Wachovia Bank, N.A. v. Burke,* 319 F. Supp. 2d 275, 285 n.5 (D. Conn. 2004)). We agree with the Ninth Circuit.

ii.

We next ask whether the OCC's regulations are based on a permissible construction of the NBA. *Chevron,* 467 U.S. at 843. If the OCC's interpretation is reasonable, we defer to its construction of the statute. *Id.* at 844-45.

The Commissioner principally contends the OCC's regulations are unreasonable interpretations of the NBA. As explained, the NBA is silent on whether the OCC may regulate national banks' operating subsidiaries. When statutes are silent, "agencies [generally] have authority to fill gaps." *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002). Further, in cases of statutory silence, we "must defer, under *Chevron,* to [an agency's interpretation of its governing statute], so long as that interpretation is permissible in light of the statutory text and reasonable." *Ohio Valley Envtl. Coal. v. Bulen,* 429 F.3d 493, 498 (4th Cir. 2005).

The NBA allows national banks to "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. The Supreme Court explains the "'business of banking' is not limited to the enumerated powers in § 24 Seventh and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated." *NationsBank of N.C.,* 513 U.S. at 258 n.2. However, "[t]he exercise of the Comptroller's discretion . . . must be kept within reasonable bounds. Ventures distant from dealing in financial investment instruments – for example, operating a general travel agency – may not exceed those bounds." *Id.*

We find the OCC's regulation of operating subsidiaries does not exceed the limitations contemplated in *NationsBank.* "Allowing national banks to create, control, and delegate banking functions to operating subsidiaries provides some assistance to banks in performing their authorized activities." *Wells Fargo,* 419 F.3d at 960. Further, 12 C.F.R. § 5.34 limits the activities national banks can conduct through operating subsidiaries to those activities that are authorized by the NBA. *See* 12 C.F.R.

§ 5.34(e)(3) ("An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."). With these principles in mind, we find that the OCC's interpretation of 12 U.S.C. § 24 Seventh is reasonable and therefore is permissible.

We also find that 12 C.F.R. § 7.4006, which provides that state laws must apply to operating subsidiaries to the same extent that state laws apply to parent national banks, is reasonable and within the OCC's delegated authority. If state law applied to operating subsidiaries to a greater extent than it applied to their parent national banks, it would frustrate national banks' right to conduct the "business of banking" through operating subsidiaries. The OCC's reasoning behind the regulation is compelling:

> When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents them from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure. In some cases, this deters them from making certain products available in certain jurisdictions.
>
> The OCC therefore is issuing this final rule in furtherance of its responsibility to enable national banks to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws, consistent with the

> national character of the national banking system, and in furtherance of their safe and sound operations.

Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004); *see also Wachovia Bank v. Burke,* 414 F.3d at 320-21 (quoting the same). We adopt this reasoning.

Accordingly, we find that the federal regulations at issue are reasonable interpretations of the NBA and are entitled to *Chevron* deference.

IV.

We join the Second, Sixth, and Ninth Circuits in finding the OCC did not exceed its delegated authority. *Wachovia Bank v. Burke,* 414 F.3d at 318-21; *Wachovia Bank v. Watters,* 431 F.3d at 562-63; *Wells Fargo,* 419 F.3d at 961-62. Accordingly, we affirm the district court's grant of summary judgment to the plaintiffs/appellees.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NATIONAL CITY BANK OF INDIANA, *et al.*,	:	
V.	:	CIVIL ACTION NO. CCB-04-2719
CHARLES W. TURNBAUGH, Commissioner of Financial Regulation, Maryland Department of Labor, Licensing and Regulation	:	

(AMENDED) MEMORANDUM

(Filed May 5, 2005)

National City Bank of Indiana ("National City Bank" or "the Bank"), a national bank that provides mortgage services to homeowners in Maryland through its wholly-owned operating subsidiaries First Franklin Financial Corporation ("First Franklin") and National City Mortgage Company ("National City Mortgage"), has filed suit along with its subsidiaries seeking declaratory and injunctive relief enjoining the Maryland Department of Labor, Licensing, and Regulation from enforcing Md. Code Ann. Com. Law § 12-105(b)(4), a Maryland law that restricts the amount of prepayment fees mortgage lenders may impose, on the theory that the Maryland law is preempted under the Supremacy Clause of the Constitution by the National Bank Act and the associated regulations promulgated by the federal Office of the Comptroller of the Currency ("OCC"). National City Bank also contends that, as a national bank, its operating subsidiaries are subject to the exclusive regulatory and supervisory authority of the OCC, and that therefore Maryland is preempted from exercising any regulatory or visitorial powers over its

subsidiaries under the Maryland Mortgage Lender Law, Md. Code Ann. Fin. Inst. §§ 11-501, *et seq.* After the parties reached an agreement as to a preliminary injunction pending the outcome of this litigation,[1] the plaintiff National City Bank, along with its subsidiaries, moved for summary judgment and a permanent injunction (docket entry no. 24), and the defendant Charles W. Turnbaugh, Commissioner of Financial Regulation of the Maryland Department of Labor, Licensing and Regulation ("Commissioner") responded with a cross-motion for summary judgment (docket entry no. 30).[2] Oral argument was heard on January 28, 2005. For the reasons stated below, I find that Maryland's laws are preempted under Article VI of the Constitution by the National Bank Act, 12 U.S.C. §§ 24(Seventh), 371, 484, and the OCC implementing regulations, including 12 C.F.R. §§ 5.34, 7.4000, 7.4006,

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[1] The parties' Stipulation to Entry of a Preliminary Injunction provides that the Commissioner and any agents from his office are enjoined from enforcing the Maryland Mortgage Lender Law, Md. Code Ann. Fin. Inst. §§ 11-501 *et seq.*, and the Maryland Prepayment Restriction, Md. Code Ann. Com. Law § 12-105(b)(4), against the plaintiffs, and from exercising any visitorial powers as defined in 12 C.F.R. § 7.4000 in any manner over plaintiffs. The plaintiffs have agreed to maintain records of all mortgage loans in Maryland that contain prepayment fees for so long as the preliminary injunction remains in effect, in order to facilitate the reimbursement of customers who pay such fees should the court find the Maryland Prepayment Restriction applies to the plaintiffs. (*See* Stipulation to Entry of a Preliminary Injunction, docket entry no. 19.)

[2] Briefs *Amici Curiae* have been filed in support of the defendant by the Conference of State Bank Supervisors (docket entry no. 36); the states and commonwealths of Connecticut, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Vermont and Washington (docket entry no. 39); and in support of the plaintiffs by the OCC (docket entry no. 42).

34.21, and 34.23. **The defendant's motion for summary judgment will be denied,** the plaintiffs' motion for summary judgment will be granted, and a permanent injunction enjoining the Commissioner from enforcing the questioned Maryland state laws against National City Bank's operating subsidiaries shall be entered.[3]

BACKGROUND

The following facts are undisputed. Plaintiff National City Bank of Indiana is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 *et seq.* National City Bank's principal place of business is Indianapolis, Indiana and it maintains no branch offices in Maryland. (*See* Pls.' Mot. for Summ. J., Ex. 4, Decl. of Mary McGuirk at ¶ 2.) National City Bank wholly owns and operates First Franklin and National City Mortgage as operating subsidiaries to conduct the Bank's residential mortgage lending. (*Id.* at ¶¶ 3, 4.) First Franklin is incorporated in Delaware and its principal place of business is San Jose, California. (*Id.* ¶ 3.) National City Mortgage is incorporated in Ohio and its principal place of business is Miamisburg, Ohio. (*Id.* ¶ 4.) Both First Franklin and National City Mortgage engage in residential mortgage lending throughout the United States and in Maryland. (*Id.* ¶¶ 3, 4.) Both operating subsidiaries provide Adjustable Rate Mortgages ("ARMs") in Maryland, some of which impose prepayment penalties in conflict with Maryland law. (*Id.* ¶¶ 5,6.)

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[3] Although initially the plaintiffs indicated they would seek attorney's fees pursuant to 42 U.S.C. § 1988, they confirmed after the January 28, 2005 hearing that they do not intend to seek such fees. (*See* Notice Regarding Intent Not to Seek Attorney's Fees, docket entry no. 48.)

The defendant Commissioner is the state official charged with enforcing the Maryland Mortgage Lender Law ("MMLL"), Md. Code Ann. Fin. Inst. §§ 11-501, *et seq.*, which provides for the licensing, regulation, supervision, examination, and enforcement of applicable laws for Maryland residential mortgage lenders. The Commissioner is also responsible for ensuring that licensed mortgage lenders comply with Md. Code Ann. Com. Law § 12-105(b)(4) ("Maryland Prepayment Restriction"), a provision that restricts the prepayment penalties lenders may impose on mortgagees.

According to the defendant, National City Mortgage was first licensed under the MMLL in June 1989; it currently has 62 licenses to do mortgage lending in Maryland. (Def.'s Cross Mot. for Summ. J. at 5.) National City Mortgage has 30 locations in Maryland and 32 locations out of the state that do business in Maryland. (*Id.*) First Franklin was licensed in Maryland under the MMLL from 1994 through December 31, 2003, when it did not renew its licenses. (*Id.* at 6.) When it was licensed, First Franklin held twelve licenses to do mortgage lending at three locations in Maryland and nine locations outside of Maryland. (*Id.* at 7.) Over the years the Commissioner has performed numerous examinations of the books and records of National City Mortgage and First Franklin to ensure compliance with the MMLL, as well as investigated some consumer complaints filed against the lenders. (*Id.* at 6-7.)

The present controversy arose from two consumer complaints filed with the Commissioner against First Franklin in June and July of 2004. In response to the first complaint, Marcia Tonkins, a Financial Examiner in the Office of the Commissioner, sent a letter to First Franklin

stating that the bank's Prepayment Note Addendum appeared to violate the Maryland Prepayment Restriction, which provides that "a lender may charge a prepayment penalty not exceeding two months' advance interest on the total amount of all prepayments made in any 12-month period in excess of one third of the amount of the original loan." (*See* Pls.' Mot. for Summ. J., Ex. A, June 29, 2004 letter from Marcia Tonkins). Tonkins asked First Franklin to provide "a list of all Maryland residents charged a prepayment penalty after July 1, 2003." (*Id.*) First Franklin responded with a letter stating that it would waive the prepayment penalty for the loan in question, but asserting that such penalties are permissible under federal law, and therefore the Commissioner had no need for a list of Maryland residents charged a prepayment penalty after July 1, 2003. (*Id.*, Ex. B, July 20, 2004 letter from Deborah Novacek.) The second consumer complaint was received by the Commissioner in July 2004. It stated in pertinent part that "I signed this mortgage note being aware of the prepayment penalty. However, I was informed by friends that prepayment penalties are illegal in the state of MD. I am in the process of selling my house and I need to know if I will have to pay the penalty." (*Id.*, Ex. C., July 20, 2004 letter.) The complaint was forwarded to First Franklin, which responded to the consumer with the explanation that the prepayment penalty is permissible under federal law. (*Id.*, Ex. D, Aug. 11, 2004 letter from Mary McGuirk.) To prevent any further action by the Commissioner, National City Bank filed this suit on August 20, 2004.[4]

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[4] As of January 1, 2005, National City Bank restructured its mortgage lending business so that First Franklin and National City Mortgage ceased to originate loans. The operating subsidiaries changed

(Continued on following page)

ANALYSIS

This case presents solely questions of law and therefore should be resolved on summary judgment.[5] The issue before the court is whether the Maryland Commissioner's efforts to exercise licensing and visitorial powers over the operating subsidiaries of national banks in Maryland, including the effort to enforce a Maryland law prohibiting mortgage prepayment penalties, are preempted by the National Bank Act and the regulations promulgated thereunder by the OCC. This court finds, consistent with several other federal district courts' review of similar cases, that the Maryland laws are preempted by the federal regulatory regime established pursuant to the National Bank Act. *See Wachovia Bank N.A. v. Burke,* 319 F. Supp. 2d 275 (D.Conn. 2004), *appeal docketed,* No. 04-3770 (2d Cir.); *Wachovia Bank, N.A. v. Watters,* 334

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their names from First Franklin Financial Corporation to First Franklin Financial Companies and from National City Mortgage Co. to National City Mortgage, Inc. Under the new arrangement, National City Bank originates loans rather than the subsidiaries, which instead service some of the Bank's loans and engage in secondary market activities. National City Bank, National City Mortgage and First Franklin continue to be under the supervision and examination of the OCC. The parties agreed at oral argument that the reorganization does not make moot the issues pending in this case, as the Commissioner still seeks visitorial powers over existing operating subsidiaries and continues to challenge the loans made prior to January 1, 2005. (*See* Pl.'s Opp. To Def.'s Cross Mot. for Summ. J., Jan. 6, 2005 Decl. of John V. Konyk, docket entry no. 43; Supp. Decl. by John V. Konyk, Jan. 18, 2005, docket entry no. 46; and Jan. 28, 2005 Hearing Transcript at 4-7 and 23-25.)

[5] Fed. R. Civ. P. 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

F. Supp. 2d 957 (W.D. Mich. 2004), *appeal docketed,* No. 04-2257 (6th Cir.); *Wells Fargo Bank N.A. v. Boutris,* 265 F.Supp.2d 1162 (E.D.Cal. 2003), *appeal docketed,* No. 03-16194 (9th Cir.); *National City Bank of Indiana v. Boutris,* 2003 WL 21536818 (E.D. Cal. July 2, 2003), *appeal docketed,* No. 03-16461 (9th Cir.).

I. *National Legal Framework*

National City Bank is chartered and organized under the National Bank Act, 12 U.S.C. § 21 *et seq.* ("the Act"), a law enacted by Congress in 1864 to "protect national banks against intrusive regulation by the States," in order to "'facilitate . . . a national banking system.'" *Bank of America v. City and County of San Francisco,* 309 F.3d 551, 561 (9th Cir. 2002) (quoting *Marquette Nat'l Bank v. First of Omaha Serv. Corp.,* 439 U.S. 299, 314-315, 99 S.Ct. 540, 549 (1978)). The OCC is a bureau of the U.S. Treasury Department charged with licensing, examining, and regulating the national banks under the National Bank Act and other federal banking laws. Accordingly, "considerable weight should be accorded" to its "construction of [the] statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 844,104 S.Ct. 2778, 2782 (1984).

Three related statutes and regulations issued thereunder are particularly pertinent to the analysis.[6] First, Congress endowed national banks with specific banking

[6] A fourth statutory provision, 12 U.S.C. § 93a, which provides that "the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office," specifically, regulation of the national banking business, is also relevant to the analysis.

powers, such as receiving deposits and loaning money, as well as the general authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). The Supreme Court has held that "the Comptroller ... has discretion to authorize activities beyond those specifically enumerated" in § 24 (Seventh). *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2, 115 S.Ct. 810, 814, n.2 (1995). In furtherance of § 24 (Seventh), the OCC issued a regulation providing that: "[a] national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking, as determined by the OCC ... " 12 C.F.R. § 5.34(e)(1).[7] In order to establish an operating subsidiary or commence a new activity in an existing operating subsidiary, the national bank must comply with the OCC's licensing and notice filing requirements as specified in 12 C.F.R. § 5.34. The regulation also provides that "[a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank." 12 C.F.R. § 5.34(e)(3).

Second, Congress has provided that: "[n]o national bank shall be subject to any visitorial powers except as

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[7] The Commissioner agreed at oral argument that the OCC was authorized to issue a regulation permitting national banks to conduct business through operating subsidiaries. (*See* Jan. 28, 2005 Hearing Tr. at 39.) *Cf. Wells Fargo Bank, N.A. v. Boutris*, 265 F.Supp.2d 1162, 1167-68 (E.D.Cal. 2003) (observing that the California Commissioner "virtually conceded the OCC's construction of 12 U.S.C. § 24 (Seventh) as authorizing national banks to conduct the business of banking through operating subsidiaries" as reasonable in light of *Nationsbank*).

authorized by Federal law . . . "[6] 12 U.S.C. § 484(a). State auditors are granted authority to review a national bank's records "solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws." 12 U.S.C. § 484(b). Under the authority of this statute, and others, in 2001 the OCC issued a regulation stating that: "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006.

Third, under 12 U.S.C. § 371(a) "[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." Pursuant to this statutory authority, the OCC has issued 12 C.F.R. § 34.21, which provides that "[a] national bank and its subsidiaries may make, sell, purchase, participate in, or otherwise deal in ARM loans and interests therein without regard to any State law limitations on those activities." In addition, "[a] national bank offering or purchasing ARM loans may impose fees for prepayments notwithstanding any State law limitations to the contrary." 12 C.F.R.

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[6] Visitorial powers refer generally to the "examination, inspection of books and records, regulation or supervision of activities authorized or permitted pursuant to federal banking law, and enforcement of compliance with any applicable federal or state laws and with principles of safe and sound banking." (*See OCC Amicus Curiae* Memo. at 3) (citing 12 C.F.R. § 7.4000(a)(2)).

§ 34.23.[9] These regulations have been supported by additional agency interpretations provided by the OCC in letters and their *amicus curiae* brief in this case.[10]

II. *State Legal Framework*

The Maryland Mortgage Lender Law ("MMLL"), Md. Code Ann. Fin. Inst. §§ 11-501, *et seq.*, was enacted in 1989 to provide a comprehensive regulatory framework for residential mortgage lending in the state and to better protect consumers. Under the MMLL, the Commissioner of Financial Regulation is responsible for ensuring that all mortgage lenders in Maryland are licensed and bonded, Md. Code Ann. Fin. Inst. §§ 11-504, 11-508. In addition, § 11-515 confers general visitorial powers on the Commissioner. The Commissioner is empowered to assess a fine or issue cease and desist orders forbidding a lender from

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[9] Although 12 C.F.R. § 34.23, unlike 12 C.F.R. § 34.21, does not mention operating subsidiaries, 12 C.F.R. §34.1(b) clarifies that 12 C.F.R. Part 34 "applies to national banks and their operating subsidiaries."

[10] *See, e.g.*, Letter of Nov. 4, 1999 from Eric Thompson, Director, Bank Activities and Structure, to Gregory J. Pulles, General Counsel, TCF Financial Corporation, explaining that 12 U.S.C. § 371 "specifically provides authority for national banks to make real estate loans subject to OCC regulations and orders," and "[t]he OCC regulations themselves contain an express preemption of state law restrictions on prepayment fees." According to Thompson, the federal policy reflects OCC's view that "the ability to charge prepayment fees in connection with ARM loans provides lenders and borrowers with additional flexibility," and this "could encourage the development of ARMS with relatively slow-moving interest rate indexes and long adjustment periods." (Compl., Ex. 2 at 1-2.). *See also* OCC *Amicus Curiae* Memo. at 10-11, stating that the OCC first codified a regulation authorizing national banks to engage in activities through operating subsidiaries in 1966 and that federal law has, with some exceptions, treated subsidiaries as functionally equivalent to their parents.

conducting business in Maryland if he finds that a licensee has violated or evaded any part of the MMLL or the regulations issued thereunder. Md. Code Ann. Fin. Inst. § 11-516. National banks are specifically exempt from the provisions of the MMLL. Md. Code Ann. Fin. Inst. § 11-502(b)(1). In addition, if a national bank is headquartered in Maryland or maintains at least one deposit-taking branch in Maryland, then its subsidiaries or affiliates are exempt from the MMLL. Md. Code Ann. Fin. Inst. § 11-502(b)(11) and (c). Finally, the Maryland law most directly at issue in this case is Md. Code Ann. Com. Law § 12-105(b)(4) ("Maryland Prepayment Restriction"), a provision that limits the terms on which mortgage lenders can impose prepayment penalties on mortgagees.[11]

III. *Preemption*

Under the Supremacy Clause of Article VI of the U.S. Constitution, "federal statutes and regulations properly enacted and promulgated can nullify conflicting state or local actions." *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 595 (4th Cir. 2005) (internal citations and quotations omitted). Federal law may preempt state law under theories of either express, field, or conflict preemption. *Id.*

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[11] "A prepayment charge or penalty on a prepayment of the unpaid principal balance of the loan, if the loan is secured by a home, by a combination of home and business property, or by agricultural property, or if the loan is a commercial loan not in excess of $5,000, provided that the charge or penalty: (i) May be imposed only on prepayments made within three years from the date the loan is made; and (ii) May not exceed an amount equal to two months' advance interest on the aggregate amount of all prepayments made in any 12-month period in excess of one third of the amount of the original loan." Md. Code Ann. Com. Law § 12-105(b)(4).

at 595-96. Here, plaintiffs focus on conflict preemption, contending that their operating subsidiaries should not be subject to conflicting Maryland and federal laws.[12] *See Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217 (1963) (a conflict arises when "compliance with both federal and state regulations is a physical impossibility"); *see also Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941) (conflict occurs when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). It is well recognized that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Savings and Loan Assoc., et al., v. de la Cuesta,* 458 U.S. 141, 153, 102 S.Ct. 3014, 3022 (1982).

There is no dispute that the state law, and the Commissioner's attempt to enforce it against national bank operating subsidiaries First Franklin and National City Mortgage, are in conflict with the federal regulations that permit prepayment charges and declare that only the OCC may exercise visitorial powers over the companies.[13] There are two related but analytically distinct frameworks that may be applied in determining whether the OCC regulations validly preempt state law. While Congressional intent is critical to both methods of analysis, the focus of

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[12] The OCC suggests that some of the regulations may be "closer to express pre-emption." *See* Jan. 28, 2005 Hearing Tr. at 19-21. *See also* Compl., Ex. 2, Nov. 4, 1999 letter from Eric Thompson (stating that 12 C.F.R. § 34.23, the OCC regulation governing ARMs, contains an "express preemption of state law restrictions on prepayment fees").

[13] As the Supreme Court noted, "[t]he conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts . . . " *Fidelity,* 458 U.S. at 155.

each is somewhat different, depending on whether the agency has issued a regulation interpreting existing law or has determined to issue a pre-emptive regulation pursuant to its delegated authority.

The OCC believes application of the two-part analysis established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778 (1984) would be appropriate, because it views its regulations as interpreting the laws already passed by Congress. *See Wachovia,* 319 F. Supp.2d at 281-82; *see also* Jan. 28, 2005 Hearing Tr. at 21. Under *Chevron,* a court must first determine whether Congress has clearly expressed its intent regarding the issue in question. If it has, then Congressional intent controls and no further inquiry is necessary. If not, then the court must decide whether the agency's action is "based on a permissible construction of the statute." *Chevron,* 467 U.S. at 842-43. Applying *Chevron,* it appears that Congress has not explicitly stated whether operating subsidiaries of national banks are subject to the exclusive visitorial and regulatory authority of the OCC, or whether state authorities may also exercise oversight and enforce conflicting state laws, specifically the Maryland law restricting mortgage prepayment. Accordingly, the second part of the *Chevron* analysis would be dispositive.

The Commissioner, however, argues that *Chevron* should not apply because the OCC's regulations are not interpreting a statutory term but rather declaring their preemptive authority over state laws. If so, the analysis would proceed under the Supreme Court's direction in *Fidelity Federal Savings and Loan Assoc. v. de la Cuesta,* 458 U.S. 141, 102 S.Ct. 3014 (1982). In *Fidelity,* the Federal Home Loan Bank board had issued a regulation

permitting federal savings and loan associations to include "due-on-sale" clauses in their loan instruments. The regulation was challenged in a suit to enforce a conflicting California state law. In upholding the validity of the regulation, the Supreme Court explained that:

> A pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive. Thus, the Court of Appeal's narrow focus on Congress' intent to supersede state law was misdirected. Rather, the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority.

Fidelity, 458 US. at 154 (internal citation omitted). Applying this approach to the present case, one would ask whether the OCC intended to pre-empt conflicting state law, and, if so, whether that action was within the scope of the authority delegated to the OCC by Congress. "Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Id.* at 153-54 (citing *U.S. v Shimer*, 367 U.S. 374, 381-382, 81 S.Ct. 1554, 1559-1560 (1961)). Congress need not expressly authorize the federal agency to preempt state law; rather, the focus is whether the agency acted reasonably within the discretion delegated by Congress. *Id.* at 154.

Considering the different approaches urged by the parties, the court will apply first *Fidelity* and then *Chevron* to the questions presented in this case. Under either analysis, the OCC regulations are valid.

Applying *Fidelity,* the Commissioner contends that because Congress did not expressly refer to operating subsidiaries of national banks, nor did it express an intent that federal regulation of operating subsidiaries preempt state regulation of such entities, the OCC overstepped its delegated authority in issuing the disputed regulations.[14] For example, the Commissioner claims that 12 U.S.C. § 371(a), which provides that "[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the

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[14] The Commissioner also argues that "state regulation of the non-bank state-chartered mortgage companies, the entities that are in issue here, has been extensive and longstanding," and thus the presumption against preemption should apply to find the Maryland laws valid. (Def.'s Cross Mot. for Summ. J. at 10-11) (citing *New York State Conf. Of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 654, 115 S.Ct. 1671, 1676 (1995) (explaining that preemption claims must be analyzed from the starting presumption that Congress does not intend to supplant state law)). This argument is not persuasive, considering that states have never regulated national banks; that under 12 C.F.R. § 5.34, operating subsidiaries have been subject to the same regulatory terms as their parent national banks at least since 1966; and that the Supreme Court has declared that historically, "grants of both enumerated and incidental powers to national banks" are "not normally limited by, but rather ordinarily pre-empt[ ], contrary state law." *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 32, 116 S.Ct. 1103, 1108 (1996) (internal quotations and citations omitted). *See also Bank of America v. City and County of San Francisco,* 309 F.3d 551, 559 (9th Cir. 2002); *Conference of State Bank Supervisors v. Conover,* 710 F.2d 878, 882 (D.C. Cir. 1983).

Currency may prescribe by regulation or order," applies only to national banks. The Commissioner argues that the OCC went beyond its discretionary authority when it relied on this statutory provision to issue a regulation that states "[a] national bank and its subsidiaries may make, sell, purchase, participate in, or otherwise deal in ARM loans and interests therein without regard to any State law limitation on those activities." 12 U.S.C. § 34.21. According to the Commissioner, the OCC not only inserted "subsidiaries" when the statute mentioned none, but the agency also unilaterally declared the preemptive effect of its regulation; had Congress intended such a result, it would have expressly stated so.

Likewise, the Commissioner argues that 12 U.S.C. § 24 (Seventh) and § 484 refer only to "national banks" and not to their subsidiaries, or, as the Commissioner classifies them, to their "non-bank, state-chartered mortgage subsidiaries." Specifically, the Commissioner claims that 12 U.S.C. § 484, the statutory provision limiting visitorial authority over national banks to only that which is "authorized by Federal law" applies to national banks only, and cannot be extended to operating subsidiaries, which are state chartered entities. The Commissioner argues that Congress understands that subsidiaries and parent corporations are legally distinct "persons" and that therefore if Congress had intended the operating subsidiaries to be treated the same as the national banks, it would have expressly stated so. Additionally, the Commissioner points out that Congress has referred explicitly to state banks, as distinct from federal or national banks, in other laws, such as those pertaining to the Federal Reserve System. *See, e.g.*,12 U.S.C. § 221.

Finally, the Commissioner asserts that the OCC exceeded the authority delegated to it by 12 U.S.C. § 93a when it promulgated regulations governing operating subsidiaries. Under 12 U.S.C. § 93a, "the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office." The statutory provision limits the Comptroller's rulemaking power "to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency," and explicitly states that the Comptroller does not have authority to regulate "securities activities of the National Banks under the Act commonly known as the 'Glass-Steagall Act.'" 12 U.S.C. § 93a. The Commissioner maintains that Congress has not extended the OCC's rulemaking authority to include oversight of the national banks' operating subsidiaries. He argues that nothing in the National Bank Act or the recent Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338, "supports, or even suggests, the necessary Congressional intent to give the OCC exclusive regulatory authority over non-bank state-chartered mortgage companies such as [National City Mortgage and First Franklin]." (Def.'s Cross Mot. for Summ. J. at 19.)

The Commissioner's arguments fail for several reasons. First, as mentioned previously, it is not necessary for Congress to explicitly state that it intends federal law, including any agency regulations promulgated pursuant to a particular statute, to preempt state law. *Fidelity,* 458 U.S. at 154. The sole inquiry is "whether [the Comptroller] has exceeded his statutory authority or acted arbitrarily." *Id.* (citing *United States v. Shimer,* 367 U.S. 374, 381-82, 81 S.Ct. 1554, 1559-60 (1961)). Therefore, the Commissioner's insistence that the statute's failure "to address

preemption" or "to delegate the power to the OCC to preempt state law as it applies to non-bank state-chartered mortgage subsidiaries," is misplaced. (Def.'s Cross Mot. for Summ. J. at 21.) Here, it is undisputed that the OCC is charged with "primary responsibility for surveillance of 'the business of banking' authorized by 12 U.S.C. § 24 (Seventh)" and "the Comptroller has discretion to authorize activities beyond those specifically enumerated." *Nationsbank of North Carolina,* 513 U.S. at 256, 258. Additionally, the D.C. Circuit has interpreted broadly the Comptroller's rulemaking authority under 12 U.S.C. § 93a to hold that the Comptroller may issue regulations that "preempt those state laws that conflict with his responsibility to ensure the safety and soundness of the national banking system" under the Federal Reserve Act. *Conference of State Bank Supervisors v. Conover,* 710 F.2d 878, 885 (D.C. Cir.1983) (holding that the Comptroller acted within his authority when he issued regulations controlling the terms under which national banks may offer ARMs).

The Commissioner does not attempt to regulate national banks directly or challenge the OCC's exclusive visitorial authority over national banks under 12 U.S.C. § 484. Further, the Commissioner concedes that under the incidental powers clause of 12 U.S.C. § 24 (Seventh) the OCC has discretion to authorize national banks to conduct business through operating subsidiaries, as declared by 12 C.F.R. § 5.34 in 1966. *See, e.g., Wachovia Bank,* 319 F.Supp.2d at 280 (D.Conn. 2004); *Wells Fargo Bank, N.A. v. Boutris,* 265 F.Supp.2d 1162, 1168 (E.D. Cal. 2003). As the *Wells Fargo* court explained, "court decisions determining whether a particular activity is permissible for a national bank have treated the activities of an operating

subsidiary as being equivalent to the activities of the national bank." 265 F.Supp.2d at 1168-69 (citing *NationsBank,* 513 U.S. at 254; *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.,* 439 U.S. 299, 99 S.Ct. 540 (1978); *American Ins. Ass'n v. Clarke,* 865 F.2d 278 (D.C. Cir. 1988)). These facts undermine the Commissioner's position that Congress did not intend for operating subsidiaries of national banks to be treated the same as their parents, and that the Comptroller has exceeded his authority by doing so.

Contrary to the Commissioner's view, as recently as 1999, when adopting § 24a of the National Bank Act as section 121 of the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 121, 113 Stat. 1338, 1373 (1999), Congress implicitly recognized and affirmed the OCC's approach to regulating operating subsidiaries of national banks when it defined a "financial subsidiary" as "other than a subsidiary that . . . engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 U.S.C. § 24a(g)(3)(A) **(tracking the language of 12 C.F.R § 5.34, the OCC regulation authorizing national banks to conduct activities through operating subsidiaries)**. As one court recently observed, this provision not only recognizes national banks' **operating** subsidiaries, it presumes that **the** OCC exercises visitorial authority over them. *See Wells Fargo Bank,* 265 F.Supp.2d at 1168 **(noting that the "financial subsidiary" definition recognizes that operating subsidiaries could exist and quoting from S. Rep. No. 106-44 at 8 (1999) which discusses national banks' longstanding practice of investing in and engaging in lending activities**

through operating subsidiaries). *See also Wachovia Bank,* 319 F.Supp. 2d at 280 (noting that this provision shows Congress has implicitly recognized the ability of a national bank to conduct its authorized activities through an operating subsidiary). This language contradicts the Commissioner's contention that Congress did not intend operating subsidiaries of national banks to be treated the same as national banks.

Accordingly, the plaintiffs have shown that the OCC did not exceed its delegated authority under the National Bank Act by authorizing national banks to establish operating subsidiaries, and by regulating operating subsidiaries on the same terms as national banks. Additionally, given the OCC's long-recognized practice of treating operating subsidiaries as arms of national banks, and the fact that Congress authorized the OCC to prescribe "restrictions and requirements" regulating a "national banking association['s]" ability to make real estate loans, 12 U.S.C. § 371(a), the OCC acted within its authority when it issued 12 C.F.R. §§ 34.21 and 34.23, which provide, respectively, that "[a] national bank and its subsidiaries may make, sell, purchase, participate in, or otherwise deal in ARM loans" and a "national bank . . . may impose fees for prepayments" notwithstanding any state law limitation on those activities. Further, the record shows that the OCC acted reasonably in making policy choices within its discretionary authority. The challenged regulations, therefore, are valid under *Fidelity.*

Under *a Chevron* analysis, the result is the same. The *Wachovia Bank* court recently analyzed the validity and preemptive force of 12 C.F.R. § 7.4006 under *Chevron,* accepting the OCC's position that the regulation merely codified the pre-existing preemption that the OCC understood to already

exist "from a combination of pre-existing statutes – section 484, section 24(Seventh), and section 371," and noting that this "type of interpretation and extrapolation is precisely the type of interpretation with which an administrative agency is charged." 319 F.Supp. 2d at 282 (citing *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S.Ct. 1291 (2000)). I agree with the *Wachovia Bank* court's determination that the OCC's conclusion, expressed in § 7.4006, that its oversight of national bank operating subsidiaries should be exclusive and pre-emptive, is a reasonable construction of the federal banking statutes, as they apply to the activities at issue here. *Id.* at 287-88. *See also Wells Fargo,* 265 F.Supp.2d at 1170.

Moreover, I find the other OCC regulations governing operating subsidiaries, including those which authorize national banks and their subsidiaries to engage in real estate lending and impose prepayment fees, are reasonable interpretations of the National Bank Act. It is undisputed that the OCC has primary responsibility for overseeing the national banking system, and that under the "incidental" power delegated by 12 U.S.C. § 24 (Seventh), this includes the authority to regulate operating subsidiaries. The Commissioner objects, however, to the OCC's claim of exclusive visitorial and regulatory authority over the operating subsidiaries of national banks. He argues that Maryland has routinely regulated such "non-bank state-chartered entities," and that viewing these subsidiaries as divisions of a national bank offends a state's sovereign right to regulate corporate entities and lenders within its borders. The Commissioner further contends that the "MMLL and the restriction on prepayment fees do not prevent the national bank's exercise of its

powers," because the MMLL does not preclude national banks from having operating subsidiaries, nor does it require national banks to make mortgage loans through its operating subsidiaries. This claim mischaracterizes the effect of the Commissioner's asserted authority over National City Bank's subsidiaries. A state may not regulate a national bank where doing so would "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 33, 116 S.Ct. 1103, 1109 (1996). In determining the preemptive scope of federal statutes and regulations granting a power to national banks, the Supreme Court reasoned that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* As the *Wachovia Bank* court succinctly stated:

> State regulation of national bank wholly-owned subsidiaries could reasonably be conceived to have the same obstructive effect on national bank operations as they would if they were directed at the bank itself. If the state could regulate national bank subsidiaries . . . it could, merely because of differences in corporate form, enforce regulations on activities which it could not regulate were they conducted through the bank itself. If, because of such regulation, the bank declined to utilize its ability to conduct its activity through the subsidiary, it would thus be hindered in its exercise of a recognized section 24 (Seventh) 'incidental' power.

319 F. Supp. 2d at 286-87. The court concluded that the OCC's determination that state regulation of operating subsidiaries "would potentially hinder the bank's 'incidental' power, granted by regulation and implicitly acknowledged by

statute, to conduct its banking business through a subsidiary, is reasonable." *Id.* at 287. The same principle applies here to preempt the Maryland Commissioner from exercising licensing and visitorial powers over National City Bank's subsidiaries or from enforcing the Maryland Prepayment Restriction.

In the end, the Commissioner essentially advances a policy reason for why his office should be able to regulate operating subsidiaries and impose the Maryland Prepayment Restriction on them: in order to better protect Maryland consumers. The Commissioner argues that National City Bank's operating subsidiaries are hiding behind their corporate form in order to avoid forfeiting approximately $4 million in prepayment fees they have collected thus far. He maintains that this gives National City Mortgage and First Franklin a competitive advantage over other state-chartered licensed lenders in the state. He claims that Maryland citizens will be irreparably harmed if his office is precluded from enforcing the Maryland Prepayment Restriction because, had they known that National City Mortgage and First Franklin were not subject to the restriction, they "might have contracted with a licensed mortgage lender that complies with Maryland law, or at the very least would be subject to the appropriate sanctions by the Commissioner." (Def.'s Cross Mot. for Summ. J. at 43.)

While the Commissioner's concerns may be legitimate, they do not overcome the fact that the National Bank Act, and the regulations promulgated by the OCC thereunder, preempt his efforts to regulate National City Bank's subsidiaries. *See Wachovia Bank.* 319 F.Supp. 2d at 287 (noting that courts have "repeatedly acknowledged that the Act's preemption of state law at times creates disparities between the

national bank and state bank competitors, and may at times even create a competitive advantage in the national bank.") It is not the province of the court to evaluate the wisdom of the OCC's determination that national banks should be able to exercise their authority to engage in real estate lending through operating subsidiaries, and to impose prepayment fees on ARM loans. The OCC has explained in its *amicus curiae* brief that when it promulgated 12 C.F.R. §§ 34.21 and 34.23 in 1981, authorizing national banks and their subsidiaries to deal in ARM loans and impose prepayment fees, it did so as part of a greater government effort to provide banks with increased flexibility in designing residential ARM loans in response to a period in the late 1970's and early 1980's that "witnessed an alarming deterioration in the number of home mortgage lending institutions – housing creditors – in part because of their inability to adjust their long-term mortgage portfolios to the high and widely fluctuating short-term deposit interest rates." (OCC *Amicus Curiae* Memo. at 4) (quoting *Nat'l Home Equity Mortgage Ass'n v. Face,* 239 F.3d 633 (4th Cir. 2001), *cert. denied,* 534 U.S. 823 (2001) (internal quotations omitted). The OCC stated in the preamble to 12 C.F.R. § 34.23 that "[p]repayment penalties may act as important deterrents to prepayment for the purpose of refinancing when mortgage rates decline. As such, they may encourage banks to make long-term fixed-rate commitments." 46 Fed. Reg. 18,932 (March 27, 1981). The OCC hoped that this would enable banks "to minimize the risk of prepayment during the period prior to the first rate change notification date and therefore will be encouraged to make ARMs with long initial grace periods or subject to less frequent rate adjustments." 46 Fed. Reg. 18,939 (March 27, 1981). Around this same time, Congress amended 12 U.S.C. § 371(a) in order "to

provide national banks with the ability to engage in more creative and flexible financing, and to become stronger participants in the home financing market." (OCC *Amicus Curiae* Memo. at 5 n.2) (quoting S. Rep. 91-536, 97th Cong. 2d Sess. 27 (1982)).

Thus, it is apparent that the OCC's regulations represent a "reasonable" policy determination well within the authority delegated to it by Congress under the National Bank Act. Further, OCC has put forth a permissible construction of the Act, and "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron,* 467 U.S. at 844. Where, as here, the "challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do." *Id* at 866.[15]

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[15] The *amici curiae* briefs filed by the Conference of State Bank Supervisors and the States Attorneys General, *see supra* note 2, urge the court to recognize the compelling state interest in regulating mortgage lenders in their states in order to protect consumers from unfair or deceptive lending practices. They argue that state agencies are better positioned than the OCC to understand local housing markets and local consumers, and that Congress did not intend to usurp their role in regulating lenders such as the operating subsidiaries of national banks. (*See* Conf. of State Bank Supervisors *Amicus Curiae* Memo. at 3; State Attorneys General *Amicus Curiae* Memo. at 3.) For the same reasons discussed above, these arguments are not persuasive. In determining that national banks can engage in mortgage lending through operating subsidiaries, and that these operating subsidiaries would be treated and regulated as national entities, the OCC made a

(Continued on following page)

VI. *Permanent Injunction*

The parties have already entered into a preliminary injunction that enjoins the Commissioner from enforcing the Maryland Prepayment Restriction or exercising visitorial powers over National City Mortgage and First Franklin, and the plaintiffs now move for a permanent injunction. The standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff must establish success on the merits and that the focus on irreparable harm includes the question whether the plaintiff has an adequate remedy at law. *Amoco Prod. Co. v. Village of Ganbell, Alaska,* 480 U.S. 531, 546 n.12, 107 S.Ct. 1396, 1404 (1987); *Wilson v. CHAMPUS,* 65 F.3d 361, 364 (4th Cir. 1995); *Broussard v. Meineke Discount Muffler Shops, Inc.,* 958 F.Supp. 1087, 1108 (W.D.N.C. 1997), *overruled on other grounds,* 155 F.3d 331 (4th Cir. 1998).

The plaintiffs contend they will suffer irreparable harm if the Commissioner is granted supervisory authority over National City Mortgage and First Franklin in that the overlapping regulatory regime "will require the expenditure of substantial resources that the Bank and its operating subsidiaries will never be able to recover," and "directly obstruct[ ]and impede[ ] the Bank's ability to exercise lending power through an operating subsidiary." (*See* Pls.' Mot. for Summ. J., Ex. 4, Decl. Of Mary McGuirk at 4.) National City Bank also asserts that if the Maryland Prepayment Restriction is enforced against its operating subsidiaries, it "will lose significant revenues, which it will

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"reasonable choice within a gap left open by Congress." *Chevron,* 467 U.S. at 866.

never be able to recover." (*Id.* at 3.) The Commissioner disputes the plaintiffs' claim of irreparable harm, arguing that the banks have a duty to reimburse Maryland consumers for the illegal charges levied against them. Additionally, the Commissioner argues that the public interest will best be served by upholding the Maryland consumer protection laws.

Based on the facts presented, it is clear that the plaintiffs will suffer irreparable harm to their business and their federally authorized banking activities if they are forced to comply with the conflicting Maryland laws. They have no adequate remedy at law. Furthermore, where, as here, the court has already determined that the plaintiffs have succeeded on the merits, "the balance-of-harm and public-interest factors need not be taken into account" *Bank One (Utah), N.A. v. Guttau,* 190 F.3d 844, 847 (8th Cir. 1999) (reversing denial of preliminary injunction and remanding for entry of a permanent injunction enjoining enforcement of state laws that conflict with the National Bank Act). Once it is determined that the state laws are preempted by federal law, the harm the state may suffer if its laws are not enforced becomes irrelevant. Rather, "the public interest will perforce be served by enjoining the enforcement of invalid provisions of state law." *Id* at 848.

V. *Conclusion*

For the reasons stated above, the plaintiffs' motion for declaratory and permanent injunctive relief will be granted, **and the defendant's motion for summary judgment will be denied**. The court finds that Maryland's Mortgage Lender Law, Md. Code Ann. Fin. Inst.

§§ 11-501 *et seq.*, as applied to national banks' operating subsidiaries, is preempted by 12 U.S.C. §§ 24 (Seventh) and 484, as well as 12 C.F.R. §§ 5.34 and 7.4006. In addition, the Maryland Prepayment Restriction, Md. Code Ann. Com. Law § 12-105(b)(4), is preempted by 12 U.S.C. § 371(a) and 12 C.F.R. §§ 34.21 and 34.23. Accordingly, the Maryland Commissioner of Financial Regulation will be enjoined from enforcing these provisions and from exercising visitorial and regulatory power over the operating subsidiaries of national banks.

A separate order follows.

May 5, 2005
Date

/s/
Catherine C. Blake
United States District Judge

UNITED STATE [SIC] DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NATIONAL CITY BANK OF INDIANA, *et al.*,	:	
V.	:	CIVIL ACTION NO.
CHARLES W. TURNBAUGH, Commissioner of Financial Regulation, Maryland Department of Labor, Licensing and Regulation	:	CCB-04-2719

ORDER

(Filed 05/05/2005)

FINAL JUDGMENT AND PERMANENT INJUNCTION

Pursuant to the accompanying Memorandum (amending the court's April 15, 2005 memorandum), it is hereby ORDERED that:

1. the defendant's Motion for Summary Judgment (docket entry no. 30) is Denied;

2. the plaintiffs' Motion for Summary Judgment and Permanent Injunction (docket entry no. 24) is Granted;

3. the Maryland Mortgage Lender Law, MD Code Ann. Fin. Inst. §§ 11-501, *et seq.*, is unenforceable as applied to national banks' operating subsidiaries, and as applied to national banks' conduct of their federally authorized activities through such subsidiaries, because it is preempted under Article VI of the United States Constitution, by the National Bank Act, and implementing

regulations of the Office of the Comptroller of the Currency, including 12 C.F.R. §§ 5.34, 7.4000, and 7.4006;

4. the Maryland prepayment fee restriction, Md. Code Ann. Com. Law § 12-105(b)(4), is unenforceable as applied to national banks and their operating subsidiaries, because it is preempted under Article VI of the United States Constitution by 12 U.S.C. § 371, and implementing regulations of the Office of the Comptroller of the Currency, including 12 C.F.R. §§ 34.21 and 34.23;

5. defendant Charles W. Turnbaugh, in his official capacity as the Commissioner of Financial Regulation, Maryland Department of Labor, Licensing and Regulation, as well as his successors, agents, including the Maryland Attorney General, and all other Maryland officers and officials, are hereby permanently ENJOINED from enforcing or taking any action to enforce the Maryland Mortgage Lender Law, Md. Code Ann. Fin. Inst. §§ 11-501, *et seq.*, and the Maryland prepayment fee restriction, Md. Code Ann. Com. Law § 12-105(b)(4), against plaintiff National City Bank of Indiana and/or its operating subsidiaries; from taking any action, pursuant to the Maryland Mortgage Lender Law, Md. Code Ann. Fin. Inst. §§ 11-501, *et seq.*, and the Maryland prepayment fee restriction, Md. Code Ann. Com. Law § 12-105(b)(4) to prevent or interfere with, both directly and indirectly, the conduct of Plaintiff's banking operations in Maryland, including taking any actions to penalize plaintiff National City Bank of Indiana and/or its operating subsidiaries; and from otherwise exercising visitorial powers over plaintiff National City Bank of Indiana and/or its operating subsidiaries;

6. copies of this Order shall be sent to counsel of record; and

7. the Clerk of the court shall **Close** this Case.

May 5, 2005
Date

/s/
Catherine C. Blake
United States District Judge

ANNOTATED CODE OF MARYLAND

Commercial Law Article, § 12-105. Charges not considered interest

* * *

(b) If the loan contract provides for them, the following fees and charges also may be collected and are not interest under this subtitle:

* * *

(4) A prepayment charge or penalty on a prepayment of the unpaid principal balance of the loan if the loan is secured by a home, by a combination of home and business property, or by agricultural property, or if the loan is a commercial loan not in excess of $5,000, provided that the charge or penalty:

(i) May be imposed only on prepayments made within three years from the date the loan is made; and

(ii) May not exceed an amount equal to two months' advance interest on the aggregate amount of all prepayments made in any 12-month period in excess of one third of the amount of the original loan.

* * *

Financial Institutions Article, § 11-502. Applicability

* * *

(b) The provisions of this subtitle do not apply to:

(1) Any bank, trust company, savings bank, savings and loan association, or credit union incorporated

or chartered under the laws of this State or the United States or any other-state bank having a branch in this State;

* * *

(11) A subsidiary or affiliate of an institution described in subsection (c) of this section, which subsidiary or affiliate:

(i) Is subject to audit or examination by a regulatory body or agency of this State, the United States, or the state where the subsidiary or affiliate maintains its principal office; and

(ii) Files with the Commissioner, prior to making mortgage loans, information sufficient to identify:

1. The correct corporate name of the subsidiary or affiliate;

2. An address and telephone number of a contact person for the subsidiary or affiliate;

3. A resident agent; and

4. Any additional information considered necessary by the Commissioner for protection of the public;

* * *

(c) The exemption in subsection (b)(11) of this section applies to subsidiaries and affiliates of:

(1) Any bank, trust company, savings bank, savings and loan association, or credit union incorporated or chartered under the laws of this State or the United States that maintains its principal office in this State;

(2) Any out-of-state bank, as that term is defined in § 5-1001 of this article, having a branch that accepts deposits in this State; or

(3) Any institution incorporated under federal law as a savings association or savings bank that does not maintain its principal office in this State but has a branch that accepts deposits in this State.

* * *

Financial Institutions Article, § 11-504. License or registration requirement

A person may not act as a mortgage lender unless the person is:

(1) A licensee; or

(2) A person exempted from licensing under this subtitle.

Financial Institutions Article, § 11-508. Surety bonds

(a) An applicant for a new license or for the renewal of a license shall file a surety bond with each original application and any renewal application for the license.

(b) The surety bond shall:

(1) Run to the Commissioner and be for the benefit of any mortgage loan borrower who has been damaged by a violation committed by a licensee of any law or regulation governing the activities of mortgage lenders;

(2) Be issued by a surety company authorized to do business in the State;

(3) Be conditioned that the applicant shall comply with all Maryland laws regulating the activities of mortgage lenders and mortgage loan lending; and

(4) Be approved by the Commissioner.

* * *

(e) Notwithstanding any other provisions of this section, and subject to approval by the Commissioner, if an applicant files five or more original or renewal applications at the same time, the applicant may provide a blanket surety bond for all licensed offices in the amount of $375,000.

* * *

Financial Institutions Article, § 11-511.1. Continuing education

(a) By July 1, 2000, the Commissioner shall adopt regulations that set continuing education requirements as a condition to the renewal of licenses under this subtitle.

(b) Any continuing education requirements established by the Commissioner under this section shall apply to the first renewal of a license.

Financial Institutions Article, § 11-517. Suspension or revocation of license; enforcement of subtitle, regulations, etc.

(a) Subject to the hearing provisions of § 11-518 of this subtitle, the Commissioner may suspend or revoke the license of any licensee if the licensee or any owner, director, officer, member, partner, stockholder, employee, or agent of the licensee:

(1) Makes any material misstatement in an application for a license;

(2) Is convicted under the laws of the United States or of any state of:

(i) A felony; or

(ii) A misdemeanor that is directly related to the fitness and qualification of the person to engage in the mortgage lending business;

(3) In connection with any mortgage loan or loan application transaction:

(i) Commits any fraud;

(ii) Engages in any illegal or dishonest activities; or

(iii) Misrepresents or fails to disclose any material facts to anyone entitled to that information;

(4) Violates any provision of this subtitle or any rule or regulation adopted under it or any other law regulating mortgage loan lending in the State; or

(5) Otherwise demonstrates unworthiness, bad faith, dishonesty, or any other quality that indicates that

the business of the licensee has not been or will not be conducted honestly, fairly, equitably, and efficiently.

* * *

(c)(1) The Commissioner may enforce the provisions of this subtitle, regulations adopted under § 11-503 of this subtitle, and the applicable provisions of Title 12 of the Commercial Law Article by:

(i) Issuing an order:

1. To cease and desist from the violation and any further similar violations; and

2. Requiring the violator to take affirmative action to correct the violation including the restitution of money or property to any person aggrieved by the violation; and

(ii) Imposing a civil penalty not exceeding $1,000 for each violation.

(2) If a violator fails to comply with an order issued under paragraph (1)(i) of this subsection, the Commissioner may impose a civil penalty not exceeding $1,000 for each violation from which the violator failed to cease and desist or for which the violator failed to take affirmative action to correct.

* * *

CODE OF MARYLAND REGULATIONS TITLE 09 DEPARTMENT OF LABOR, LICENSING AND REGULATION SUBTITLE 03 COMMISSIONER OF FINANCIAL REGULATION CHAPTER 06 MORTGAGE LENDERS

.17 Continuing Education.

A. Purpose and Applicability.

(1) The State legislature has determined that it is in the public interest to require licensees to comply with a continuing education requirement as a prerequisite to the renewal of a mortgage lender license.

(2) Subject to Financial Institutions Article, § 11-511.1, Annotated Code of Maryland, the continuing education requirement does not apply to the original application for a license.

* * *

C. Requirements.

(1) Except as provided in § A(2) and (3) of this regulation, in order to renew a license, each covered employee of a licensee shall successfully complete in the licensing period immediately preceding the current renewal period at least 20 hours of continuing education in approved courses.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

NATIONAL CITY BANK OF INDIANA, *et al.*	*	
Plaintiffs,	*	
v.	*	NO. CCB-04-CV-2719
CHARLES W. TURNBAUGH, in his official capacity as Commissioner of Financial Regulation of the State of Maryland	*	
Defendant.	*	

* * * * * * *

DECLARATION OF CALVIN E. CLARK

I, CALVIN E. CLARK, do hereby declare:

1. I am the Assistant Commissioner of Financial Regulation of the State of Maryland for Licensing and Consumer Services. My duties include overseeing the licensing of Maryland mortgage lenders and the processing of consumer complaints against them. I am also the custodian of the licensing records of the Office of the Commissioner. The statements in this declaration are based on my review of the official records of the Office of the Commissioner; and I am competent to testify as to the matters described herein.

2. National City Mortgage Company ("NCMC") was first licensed under the Maryland Mortgage Lender Law ("MMLL"), Financial Institutions Article ("FI"), Title 11, Subtitle 5, Annotated Code of Maryland, in June of 1989.

NCMC has been issued a total of 62 mortgage lender licenses as indicated in Exhibit 1-A attached hereto. Thirty of these are for Maryland locations and 32 are for out-of-state locations. These include 38 licenses for National City Mortgage Company ("NCMC"), two licenses for NCMC d/b/a Accubanc Mortgage Company, one license for NCMC d/b/a Commonwealth Mid-Atlantic Mortgage, three licenses for NCMC d/b/a Commonwealth United Mortgage Co., one license for NCMC d/b/a Eastern Mortgage, nine licenses for NCMC d/b/a Eastern Mortgage Services, and eight licenses for NCMC d/b/a FNMC. In addition, four licenses have been issued for various partnerships in which NCMC has an interest. All of these licenses will expire on December 31, 2005, unless they are renewed for an additional two-year period.

3. During the period beginning on January 17, 1994 and ending on December 31, 2003, First Franklin Financial Corporation ("FFFC") was issued 12 mortgage lender licenses, three of which were for Maryland locations and nine of which were for out-of-state locations. (Exhibit 1-B) FFFC did not renew its licenses after December 31, 2003.

4. According to information filed with the Office of the Commissioner by Plaintiff NCMC, during the 12 months ending November 23, 2004 it made 25,721 Maryland mortgage loans totaling $4,453,147,437; and brokered 521 Maryland mortgage loans totaling $89,442,944.

5. During fiscal years 2002, 2003, 2004 and 2005, the Office of the Commissioner received and investigated a total of 2,894 consumer complaints involving mortgage lenders. Of that total, complaints against Plaintiff NCMC were as follows: 2002-5; 2003-7; 2004-7; and 2005-1. All complaints were resolved in a satisfactory manner.

6. During fiscal year 2003, the Office of the Commissioner received and investigated two consumer complaints against Plaintiff FFFC; and in 2004 there was one complaint. All complaints were, resolved in a satisfactory manner.

7. Pursuant to FI § 11-515 the Commissioner conducts periodic examinations of all licensees' mortgage lending activities. The examination records of the Office of the Commissioner indicate that during the period they have been licensed mortgage lenders, the Commissioner has conducted numerous examinations of Plaintiff NCMC under its various trade names. The examinations include, but are not limited to the following: 1998 – an Annapolis branch of NCMC; 1999-2000 – two branches of NCMC d/b/a FNMC; 2000 – two loacations of NCMC d/b/a Eastern Mortgage Services; 2000 – an office of NCMC d/b/a Accubanc Mortgage Company; December 2001 – a combined examination of 50 locations of NCMC and its various trade names. According to the examination records of the Commissioner, NCMC is currently due for its next examination. During none of these examinations did NCMC object to the Commissioner's exercise of regulatory oversight.

8. The records of the Office of the Commissioner show that the following examinations of Plaintiff FFFC were conducted: 2000, 2002 and 2003 – FFFC d/b/a First Street; and 2000 – FFFC d/b/a Columbia Mortgage. FFFC did not object to the Commissioner's oversight during any of these examinations.

9. According to the website of the Maryland Department of Assessments and Taxation ("www.dat.state.md.us") NCMC first registered as a foreign corporation doing business in Maryland on July 13, 1882. (Exhibit 1-C)

10. According to the website of the Maryland Department of Assessments and Taxation ("www.dat.state.md.us") FFFC first registered as a foreign corporation doing business in Maryland on September 1, 1993. Although that authority was forfeited on November 18, 1996, it requalified, on December 11, 1997. (Exhibit 1-D)

11. As of November 30, 2004 there were 4,162 mortgage lender licenses issued and outstanding in Maryland, at least 124 of which have been issued to subsidiaries or affiliates of national banks. In addition to Plaintiff NCMC, they include at least 58 mortgage lender licenses issued to subsidiaries or affiliates of HSBC Bank, N.A., Bank of America, and J.P. Morgan Chase Bank. (Exhibit 1-E)

12. The MMLL includes exemptions for a number of categories of mortgage lenders. Included are exemptions for national banks, affiliates of national banks that are headquartered in Maryland, and affiliates of national banks that have deposit-taking branches in Maryland (FI § 11-502(b) and (c)). Thus, the MMLL provides several means by which a non-bank state-chartered subsidiary of a national bank can engage in mortgage lending without being subject to the MMLL. For example, the licensing records of the Office of the Commissioner indicate that Wells Fargo Home Mortgage, Inc., a subsidiary of Wells Fargo Bank, National Association, had previously been issued 37 mortgage lender licenses, the first of which was issued on January 5, 1990. According to the website of the Maryland Department of Assessments and Taxation ("www.dat.state.md.us"), on July 6, 2004 Wells Fargo Home Mortgage, Inc. notified the State of Maryland that it had merged into its. parent; Wells Fargo Bank, National Association. As a result of the merger, because the mortgage

lending activities are now being conducted through a national bank, Wells Fargo is no longer subject to the MMLL. (Exhibit 1-F)

13. Information regarding the licensing status of mortgage lenders is readily available to the public on the, website of the Office of the Commissioner "www.dllr.state.md.us/finance/consindex.htm". By simply entering the name of the mortgage lender, a consumer can determine if the entity is currently licensed, its trade name, if any, and its business address. This allows consumers to verify if they are dealing with a licensed mortgage subject to the various requirements of the law, including, but not limited to, bonding, continuing education, and Maryland restrictions on prepayment fees.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16, 2004.

/s/ Calvin E. Clark
CALVIN E. CLARK

National City Mortgage Company Licensing Survey

Maryland Department of Labor, Licensing and Regulation

Office of the Commissioner of Financial Regulation

EXHIBIT 1-A

License	Address	City	State	Zip Code	Status	Effective	Expiration
332	101 Baughman's Lane, Suite 202	Frederick	MD	21702-0000	Active	06/30/89	12/31/05
334	6110 Executive Boulevard, Suite 250	Rockville	MD	20852-0000	Active	06/30/89	12/31/05
2117	130 North Bond Street, Suite 201 & 202	Bel Air	MD	21014-0000	Active	06/10/92	12/31/05
5268	1350 Blair Drive, Suite A	Odenton	MD	21113-0000	Active	09/08/98	12/31/05
5270	10626 York Road, Suite A	Cockeysville	MD	21030-0000	Active	09/08/98	12/31/05
6415	1403 Corporate Center Parkway	Santa Rosa	CA	54007-5434	Active	04/10/00	12/31/05
6836	1595 Spring Hill Road	Vienna	VA	22182-0000	Active	10/06/00	12/31/05
7112	3232 Newmark Drive	Miamisburg	OH	45342-0000	Active	03/20/01	12/31/05
8439	4490 Holland Office Park, Suite 100	Virginia Beach	VA	23452-0000	Active	08/30/02	12/31/05
8830	10990 Wilshire Blvd., #1000	Los Angeles	CA	90024-0000	Active	01/10/03	12/31/05
8831	One NCC Parkway, Fas Campus Bldg C	Kalamazoo	MI	49009-0000	Active	01/10/03	12/31/05
9180	12501 Seal Beach Blvd., Suite 225	Seal Beach	CA	90740-0000	Active	04/10/03	12/31/05
9181	6333 Greenwich Drive, Suite 100	San Diego	CA	92122-0000	Active	04/10/03	12/31/05
9182	965 White Plains Road, Suite 301	Trumbull	CT	06611-0000	Active	04/10/03	12/31/05
9183	115 E. Dover Street, Suite 4	Easton	MD	21601-0000	Active	04/10/03	12/31/05
9201	3980 Chicago Drive SW, Suite 210	Grandville	MI	49418-0000	Active	04/10/03	12/31/05
9546	2497 Bethel Avenue, Suite 102	Port Orchard	WA	00009-8366	Active	05/06/03	12/31/05
11417	7204 Glen Forest Drive	Richmond	VA	23226-2007	Active	07/14/04	12/31/05

Accubanc Mortgage

License	*Address*	*City*	*State*	*Zip Code*	*Status*	*Effective*	*Expiration*
6418	3060 Royal Boulevard South, Suite 120	Alpharetta	GA	30022-4461	Active	04/10/00	12/31/05
6422	50 Berkshire Court, Suite 209	Wyomissing	PA	19610-1219	Active	04/10/00	12/31/05
6424	780 Lynnhaven Parkway, Suite 300	Virginia Beach	VA	23452-0000	Active	04/10/00	12/31/05
6425	161-B Jennifer Road	Annapolis	MD	21401-0000	Active	04/10/00	12/31/05
6426	7833 Walker Drive, Suite 640	Greenbelt	MD	20770-0000	Active	04/10/00	12/31/05
6427	702 Russell Avenue, Suite 305	Gaithersburg	MD	20770-0000	Active	04/10/00	12/31/05
6428	604 Solarex Court, Suite 100	Frederick	MD	21703-0000	Active	04/10/00	12/31/05
6429	10415 Southern Maryland Blvd.	Dunkirk	MD	20754-0000	Active	04/10/00	12/31/05
6430	10400 Little Patuxent Pkwy., Suite 470	Columbia	MD	21044-0000	Active	04/10/00	12/31/05
6431	4825 Bethesda Avenue	Bethesda	MD	20814-0000	Active	04/10/00	12/31/05
6432	5 Bel Air South Pkwy, Suite 209	Bel Air	MD	21015-0000	Active	04/10/00	12/31/05
6434	1301 York Road, Suite 205	Lutherville	MD	21093-0000	Active	04/10/00	12/31/05
6435	1012 State College Road, Suite 103	Dover	DE	19904-6503	Active	04/10/00	12/31/05
6621	7125 Thomas Edison Drive	Columbia	MD	21046-2209	Active	06/30/00	12/31/05
6729	1036 Circle Drive, Suite 132	Eldersburg	MD	21784-0000	Active	08/17/00	12/31/05
6730	300 East Lombard Street, Suite LB 03	Baltimore	MD	21202-0000	Active	08/17/00	12/31/05
6914	13942 South Solomons Island Road	Solomons	MD	20688-0000	Active	11/15/00	12/31/05
7182	11781 Lee Jackson Highway, Suite 370	Fairfax	VA	22033-0000	Active	04/12/01	12/31/05
8051	2205 Fontaine Avenue, Suite 206	Charlottesville	VA	22903-0000	Active	05/23/02	12/31/05
10866	301 Steeplechase Drive	Prince Frederick	MD	20678-0000	Active	05/06/04	12/31/05

Accubanc Mortgage Company

License	Address	City	State	Zip Code	Status	Effective	Expiration
6416	253 Aikens Center	Martinsburg	WV	25401-5711	Active	04/10/00	12/31/05
6433	2670 Crain Highway, Suite 101	Waldorf	MD	20601-0000	Active	04/10/00	12/31/05

Commonwealth Mid-Atlantic Mort

License	Address	City	State	Zip Code	Status	Effective	Expiration
7538	5115 Pegasus Court, Suite A-B	Frederick	MD	21704-0000	Active	11/13/01	12/31/05

Commonwealth United Mortgage Co.

License	Address	City	State	Zip Code	Status	Effective	Expiration
9344	4400 Route 9 S, 3rd Floor	Freehold	NJ	07728-0000	Active	05/06/03	12/31/05
9345	100 Walnut Avenue, 1st Floor	Clark	NJ	07066-0000	Active	05/06/03	12/31/05
9346	502 W. Germantown Pike, Suite 106	Plymouth Meetin	PA	19462-0000	Active	05/06/03	12/31/05

Eastern Mortgage

License	Address	City	State	Zip Code	Status	Effective	Expiration
5408	18310 Montgomery Village	Gaithersburg	MD	20879-3552	Active	10/06/98	12/31/05

Eastern Mortgage Services

License	Address	City	State	Zip Code	Status	Effective	Expiration
5407	4201 Northview Drive, Suite 223	Bowie	MD	20716-1300	Active	10/06/98	12/31/05
6844	233 Garrisonville Road, Suite 202 Unit 1	Stafford	VA	22554-0000	Active	10/06/00	12/31/05
6845	13000 Harbor Drive, Suite 300	Lake Ridge	VA	22192-0000	Active	10/06/00	12/31/05
6846	4000 Legato Road, Suite 600	Fairfax	VA	22033-2924	Active	10/06/00	12/31/05
8447	3 Greentree Center, Suite 103	Marlton	NJ	08053-0000	Active	09/10/02	12/31/05

9547	W. 115 Century Road	Paramus	NJ	07652-0000	Active	06/06/03	12/31/05
9548	400 W. Main Street	Freehold	NJ	07728-0000	Active	06/06/03	12/31/05
9731	2148 Embassy Drive, Suite 106	Lancaster	PA	17603-0000	Active	07/29/03	12/31/05
9732	1530 8th Avenue, Suite 201	Bethlehem	PA	18018-0000	Active	07/29/03	12/31/05

FNMC

License	*Address*	*City*	*State*	*Zip Code*	*Status*	*Effective*	*Expiration*
5265	900 East Main Street	Salisbury	MD	21801-0000	Active	09/08/98	12/31/05
5267	2730 West University Blvd., Suite 604	Wheaton	MD	20902-0000	Active	09/08/98	12/31/05
5269	7833 Walker Drive, Suite 607	Greenbelt	MD	20770-0000	Active	09/08/98	12/31/05
5271	8440 Leonardtown Road	Hughesville	MD	20637-0000	Active	12/22/98	12/31/05
6847	2555 Kingston Road, Suite 190	York	PA	17402-0000	Active	10/06/00	12/31/05
6848	7010 Little River Turnpike, Suite 450	Annandale	VA	22003-0000	Active	10/06/00	12/31/05
6913	5801 Deale Churchton Road, Suite 203B	Deale	MD	20751-0000	Active	11/15/00	12/31/05
9347	15400 Calhoun Drive, Suite100	Rockville	MD	20855-0000	Active	05/06/03	12/31/05

National City Mortgage-Partnerships/Joint Ventures

Active

License	Trade Name	Address	City	State	Zip Code	Effective	Expiration
7693	Reliable Mortgage Investors, LLC	7833 Walker Drive, Suite 415	Greenbelt	MD	20770	2/26/2002	12/31/2005
8142	Home Mortgage Centre, LLC	3300 Olney Sandy Spring Road	Olney	MD	20832	10/1/2002	12/31/2005
10358	Delmarva Mortgage, LLC	715 Rehoboth Ave., Henlopen Junc. Ste 11	Rehoboth Beach	DE	19971	2/17/2004	12/31/2005
11896	FCB Mortgage, LLC	30 W. Patrick Street	Frederick	MD	21701	11/3/2004	12/31/2005

Non-Active

License	Trade Name	Address	City	State	Zip Code	Effective	Expiration
7756	Tower Mortgage, LLC (Closed 11/17/04)	828 Greenbriar Parkway	Chesapeake	VA	23320	6/10/2002	12/31/2005

First Franklin Financial Corporation Licensing Survey

Maryland Department of Labor, Licensing and Regulation

Office of the Commissioner of Financial Regulation

EXHIBIT 1-B

Non-Active

License	Address	City	State	Zip Code	Effective	Expiration
2866	2150 North First Street	San Jose	CA	95131	1/17/1994	12/31/1995
3137	3601 Commerce Drive, #102	Baltimore	MD	21227	7/29/1994	12/31/1995
3138	6550 Rock Springs Road, #150	Bethesda	MD	20817	7/29/1994	12/31/1994
3139	Q749 Old Meadow Road, #100	McLean	VA	22102	7/29/1994	12/31/1995
4948	600 West Cummings Park, Ste 3450	Woburn	MA	01801	3/31/1998	12/31/2003
5097	2300 Main Street, Section B	Irvine	CA	92614	6/3/1998	12/31/2003
6376	4041 Powder Mill Road, Suite 400	Calverton	MD	20705	3/28/2000	12/31/2003
6377	2150 North First Street	San Jose	CA	95131	3/28/2000	12/31/2003
7991	2150 North First Street	San Jose	CA	95131	5/24/2002	12/31/2003
7992	240 Commerce Drive, Suite 100	Irvine	CA	92602	5/24/2002	12/31/2003
7993	600 West Cummings Park	Woburn	MA	01801	5/24/2002	12/31/2003
9158	150 Allegheny Center	Pittsburgh	PA	15212	4/11/2003	12/31/2003

EXHIBIT 1-C

[SEAL] **Maryland Department of Assessments and Taxation 4**

Taxpayer Services Division
301 West Preston Street W Baltimore, Maryland 21201

Main Menu | Security Interest Filings (UCC) | **Business Entity Information**

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Home

Taxpayer Services Division

Entity Name: NATIONAL CITY MORTGAGE CO.
Dept. ID #: F01424688

General Information	Amendments	Personal Property	Certificate of Status

Principal Office (Current):	SUITE 1880, WINTERS BANK TOWER DAYTON, OH 45423
Resident Agent (Current):	THE CORPORATION TRUST INCORPORATED 300 E LOMBARD ST BALTIMORE, MD 21202
Status:	INCORPORATED
Good Standing:	Unknown
Business Code:	Financial Institutions
Date of Formation or Registration	07/13/1982

State of Formation:	OH
Stock/Nonstock:	N/A
Close/Not Close:	Unknown

Link Definition	
General Information	General information about this entity
Amendments	Original and subsequent documents filed
Personal Property	Personal Property Return Filing Information and Personal Property Assessments
Certificate of Status	Get a Certificate of Good Standing for this entity.

[SEAL]

Maryland Department of Assessments and Taxation 4

Taxpayer Services Division
301 West Preston Street W Baltimore, Maryland 21201

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Taxpayer Services Division

Entity Name: NATIONAL CITY MORTGAGE CO.
Dept. ID #: F01424688

General Information | Amendments | Personal Property | Certificate of Status

Mailing Address

NATIONAL CITY MORTGAGE CO.

1900 E 9TH ST FL 14
CLEVELAND, OH 44114 3401

Personal Property Filings

Asmt. Year	Filing Date	Extension	Penalty Amount	Penalty Paid Date
2004	04/08/2004	No		
2003	03/24/2003	No		
2002	04/03/2002	Yes		
2001	04/16/2001	No		
2000	06/03/2000	No		

Personal Property Assessments Summary

Asmt. Year	Date Assessed	County Base	Town Base	Date Certified
2004	05/21/2004	0	0	
2003	04/22/2003	0	0	
2002	07/26/2002	0	0	
2001	05/23/2001	0	0	
2000	07/29/2000	0	0	

Personal Property Assessments Certification Information

Asmt. Year	Date Assessed	County Base	Town Base	Date Certified

Link	Definition
General Information	General information about this entity
Amendments	Original and subsequent documents filed
Personal Property	Personal Property Return Filing Information and Personal Property Assessments
Certificate of Status	Get a Certificate of Good Standing for this entity.

EXHIBIT 1-D

[SEAL] **Maryland Department of Assessments and Taxation 4**

Taxpayer Services Division
301 West Preston Street W Baltimore, Maryland 21201

Main Menu | Security Interest Filings (UCC) | **Business Entity Information**

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Taxpayer Services Division

Entity Name: FIRST FRANKLIN FINANCIAL CORPORATION
Dept. ID #: F04856431

General Information	Amendments	Personal Property	Certificate of Status

Principal Office (Current):	2150 NORTH FIRST STREET SAN JOSE, CA 95131
Resident Agent (Current):	THE CORPORATION TRUST INCORPORATED 300 E LOMBARD ST BALTIMORE, MD 21202
Status:	INCORPORATED
Good Standing:	Yes
Business Code:	Ordinary Business – Stock
Date of Formation or Registration	12/11/1997
State of Formation:	DE
Stock/Nonstock:	Stock
Close/Not Close:	Unknown

Link Definition	
General Information	General information about this entity
Amendments	Original and subsequent documents filed
Personal Property	Personal Property Return Filing Information and Personal Property Assessments
Certificate of Status	Get a Certificate of Good Standing for this entity.

[SEAL] **Maryland Department of Assessments and Taxation 4**

Taxpayer Services Division
301 West Preston Street W Baltimore, Maryland 21201

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Taxpayer Services Division

Entity Name: FIRST FRANKLIN FINANCIAL CORPORATION
Dept. ID #: F04856431

General Information | Amendments | Personal Property | Certificate of Status

Mailing Address

FIRST FRANKLIN FINANCIAL CORPORATION

1900 EAST 9TH STREET 10TH FL.
CLEVENLAND, OH 44114

Personal Property Filings

Asmt. Year	Filing Date	Extension	Penalty Amount	Penalty Paid Date
2004	04/08/2004	No		
2003	04/07/2003	No		
2002	04/12/2002	No		

2001	04/16/2001	No
2000	04/17/2000	No

Personal Property Assessments Summary

Asmt. Year	Date Assessed	County Base	Town Base	Date Certified
2004	05/19/2004	82540	0	05/19/2004
2003	06/18/2003	34080	0	06/18/2003
2002	04/24/2002	34000	0	04/24/2002
2001	07/10/2002	53370	0	07/10/2002
2000	06/09/2000	81360	0	06/09/2000

Personal Property Assessments Certification Information

Asmt. Year	Location	County	License	Town	Date Certified
2004	Prince George's County	82540			05/19/04
* * * *		82540			
2003	Prince George's County	34080			06/18/03
* * * *		34080			
2002	Prince George's County	34000			04/24/02
* * * *		34000			

2001	Prince George's County	53370	07/10/02
* * * *		53370	
2000	Prince George's County	81360	06/09/00
* * * *		81360	

Link	Definition
General Information	General information about this entity
Amendments	Original and subsequent documents filed
Personal Property	Personal Property Return Filing Information and Personal Property Assessments
Certificate of Status	Get a Certificate of Good Standing for this entity.

[SEAL]

Maryland Department of Assessments and Taxation 1

Taxpayer Services Division
301 West Preston Street W Baltimore, Maryland 21201

Taxpayer Services Division

Entity Name: FIRST FRANKLIN FINANCIAL CORPORATION
Dept. ID #: F03724259

General Information	Amendments	Personal Property	Certificate of Status

Principal Office (Current):	2150 N FIRST ST SAN JOSE, CA 95131
Resident Agent (Current):	THE CORPORATION TRUST INCORPORATED 32 SOUTH ST BALTIMORE, MD 21202
Status:	FORFEITED
Good Standing:	No
Business Code:	Ordinary Business – Stock
Date of Formation or Registration	09/01/1993
State of Formation:	CA
Stock/Nonstock:	Stock
Close/Not Close:	Unknown

Link	Definition
General Information	General information about this entity
Amendments	Original and subsequent documents filed
Personal Property	Personal Property Return Filing Information and Personal Property Assessments
Certificate of Status	Get a Certificate of Good Standing for this entity.

[SEAL] **Maryland Department of Assessments and Taxation 1**

Taxpayer Services Division
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Taxpayer Services Division

Entity Name: FIRST FRANKLIN FINANCIAL CORPORATION
Dept. ID #: F03724259

General Information | Amendments | Personal Property | Certificate of Status

NOTICE ABOUT IMAGE AVAILABILITY AND ACCURACY

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Description	Date Filed	Time	Film	Folio	Pages	View Document	Order Copies
AUTHORITY TO DO BUSINESS IN MARYLAND FORFEITED	11/18/ 1996	08:30 AM	00000	0000	0000		

FAILURE TO FILE A PERSONAL
PROPERTY RETURN (FORM #1) DUE

QUALIFICATION	09/01/ 1993	08:13 AM F3543 1628 0003

Link Definition	
General Information	General information about this entity
Amendments	Original and subsequent documents filed
Personal Property	Personal Property Return Filing Information and Personal Property Assessments
Certificate of Status	Get a Certificate of Good Standing for this entity.

FILED
JAN 10 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-653

IN THE

Supreme Court of the United States

CHARLES W. TURNBAUGH, in his official capacity as Commissioner of Financial Regulation, Maryland Department of Labor, Licensing and Regulation,

Petitioner,

v.

NATIONAL CITY BANK OF INDIANA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Robert A. Long
Counsel of Record
Keith A. Noreika
Emily Johnson Henn
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Respondents

January 2007

QUESTION PRESENTED

Whether mortgage lending activities conducted through a national bank operating subsidiary are subject to the exclusive supervision and regulation of the Office of the Comptroller of the Currency, just as they are when conducted directly by the parent national bank.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner is Charles W. Turnbaugh, Commissioner of Financial Regulation, Maryland Department of Labor, Licensing and Regulation. Petitioner was the defendant in the district court and the appellant in the court of appeals. The respondents are National City Bank of Indiana and two of its operating subsidiaries, National City Mortgage Co. and First Franklin Financial Corporation. The respondents were plaintiffs in the district court and appellees in the court of appeals. During the course of this litigation, Respondent First Franklin Financial Corporation changed its name to First Franklin Financial Companies, Inc., and Respondent National City Mortgage Co. changed its name to National City Mortgage, Inc. For convenience, the parties have continued to refer to the Respondents by their prior names. On December 30, 2006, Merrill Lynch Bank & Trust Co., FSB, purchased assets of the former First Franklin Financial Corporation.

National City Mortgage Co. and First Franklin Financial Corporation are wholly-owned subsidiaries of National City Bank of Indiana, which in turn is a wholly-owned subsidiary of National City Corporation, a publicly-traded financial services holding company.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reporte 463 F.3d 325. The opinion of the district court (Pet. A 4-41) is reported at 367 F. Supp. 2d 805.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2006. The petition for a writ of certiorari was filed on November 7, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Respondent National City Bank of Indiana is a federally-chartered national bank. Pet. App. 16. When this litigation commenced, two of its wholly-owned operating subsidiaries – National City Mortgage Co. and First Franklin Financial Corporation – made mortgage loans to customers in several states, including Maryland. *Id.* National City Mortgage Co. is an Ohio corporation that has its principal place of business in Ohio; First Franklin is a Delaware corporation that has its principal place of business in California. *Id.*[1]

In June 2004, a financial examiner in the office of Maryland's Department of Labor, Licensing and

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[1] As of January 1, 2005, Respondents restructured their mortgage lending business so that mortgage loans are now made directly by National City Bank of Indiana rather than through its operating subsidiaries. Pet. App. 18 n.4. In addition, on December 31, 2006, the bank sold the assets of the former First Franklin Financial Corporation to Merrill Lynch Bank & Trust Co., FSB.

Regulation sent a letter to First Franklin stating that a provision in a mortgage agreement between First Franklin and a borrower in Maryland appeared to violate a Maryland law restricting the fees that a mortgage lender may charge a borrower in the event the borrower elects to prepay an Adjustable Rate Mortgage (ARM). Pet. App. 18. The letter asked First Franklin to submit "a list of all Maryland residents charged a prepayment penalty after July 1, 2003." *Id.* In replying to the letter, Respondents noted that national banks and their operating subsidiaries are authorized by federal law to charge a fee for prepayment of ARMs. *Id.*[2] In August 2004, after Petitioner's office forwarded a second consumer complaint to First Franklin raising the same issue, Respondents filed this action to determine their obligations under federal and state law. *Id.*

2. The parties stipulated to the entry of a preliminary injunction enjoining Petitioner from enforcing the prepayment restriction or otherwise exercising visitorial powers over Respondents. Pet. App. 15. Thereafter, the district court entered summary judgment for the Respondents and permanently enjoined Petitioner from enforcing the challenged provisions of state law against Respondents, and from exercising visitorial authority over national banks. *Id.* at 14-41.

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[2] The Comptroller of the Currency has authorized national banks and their operating subsidiaries to charge prepayment fees, because such fees "'minimize the risk of prepayment during the period prior to the first rate change notification date and therefore [mortgage lenders] will be encouraged to make ARMs with long initial grace periods or subject to less frequent rate adjustments.'" Pet. App. 37, quoting 46 Fed. Reg. 18,939 (Mar. 27, 1981).

The court observed that "[t]here is no dispute that the state law, and [Petitioner's] attempt to enforce it against national bank operating subsidiaries . . . , are in conflict with the federal regulations that permit prepayment charges and declare that only the OCC may exercise visitorial powers over the [operating subsidiaries]." Pet. App. 25. The district court analyzed the case under "two related but analytically distinct frameworks," *id.*, and concluded that both lines of analysis lead to the conclusion that the OCC's regulations are valid and the Maryland laws at issue are preempted.

Applying the framework of *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), the court asked (i) "whether the OCC intended to pre-empt conflicting state law" and (ii) "if so, whether that action was within the scope of the authority delegated to the OCC by Congress." Pet. App. 27. Under this framework, the court noted, there is no requirement that Congress must expressly delegate authority to preempt state law to the OCC. Pet. App. 30-31 (citations omitted). Moreover, in the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999), "Congress implicitly recognized and affirmed the OCC's approach to regulating operating subsidiaries of national banks." Pet. App. 32, quoting 12 U.S.C. § 24a(g)(3)(A). The court found additional support for its conclusion in decisions of this Court that "'have treated the activities of an operating subsidiary as being equivalent to the activities of the national bank.'" Pet. App. 31-32, quoting *Wells Fargo Bank, N.A. v. Boutris*, 265 F. Supp. 2d 1162, 1168 (E.D. Cal. 2003), citing, *e.g.*, *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 254 (1995).

The court reached the same result under the framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Pet. App. 33. The court held that the OCC's regulations, including in

particular 12 C.F.R. § 7.4006, are a reasonable interpretation of "a combination of pre-existing statutes – section 484, section 24(Seventh), and section 371." Pet. App. 34, citing *Wachovia Bank, N.A. v. Burke*, 319 F. Supp. 2d 275, 282 (D. Conn. 2004). The court agreed that

> "[s]tate regulation of national bank wholly-owned subsidiaries could reasonably be conceived to have the same obstructive effect on national bank operations as they would if they were directed at the bank itself. If the state could regulate national bank subsidiaries . . . it could, merely because of the differences in corporate form, enforce regulations on activities which it could not regulate were they conducted through the bank itself. If, because of such regulation, the bank declined to utilize its ability to conduct its activity through the subsidiary, it would thus be hindered in its exercise of a recognized section 24 (Seventh) 'incidental' power."

Pet. App. 35, quoting *Wachovia*, 319 F. Supp. 2d at 286-87.

3. The court of appeals unanimously affirmed. Pet. App. 1-13. The court began by "summariz[ing] the relevant federal statutory and regulatory framework." Pet. App. 5. "Congress enacted the NBA in 1864 to facilitate . . . a national banking system." Pet. App. 5, quoting *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978) (internal quotation and citation omitted). "The OCC has the 'primary responsibility for surveillance of the "business of banking" authorized by [the NBA].'" Pet. App. 6, quoting *NationsBank*, 513 U.S. at 256.

The court's analysis focused on three federal statutory provisions and related OCC regulations. *First*, national banks have "general authority to 'exercise all such incidental powers as shall be necessary to carry on the business of banking.'" Pet. App. 6, quoting 12 U.S.C. § 24 Seventh. Pursuant to this authority, "the OCC allows national banks to conduct 'business of banking activities' through operating subsidiaries." Pet App. 6, citing 12 C.F.R. § 5.34(e)(1).

Second, "national banks may engage in residential lending as regulated by the OCC." Pet. App. 6, citing 12 U.S.C. § 371(a). The OCC's regulations implementing this provision provide that "national banks and subsidiaries may deal in ARM loans 'without regard to any State law limitations on those activities,'" and that "'[a] national bank offering or purchasing ARM loans may impose fees for prepayments notwithstanding any State law limitations to the contrary.'" Pet. App. 6, quoting 12 C.F.R. §§ 34.21(a) & 34.23.

Third, "[n]o national bank shall be subject to any visitorial powers except as authorized by federal law . . . ." Pet. App. 6, quoting 12 U.S.C. § 484(a). An OCC regulation provides that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." Pet. App. 7, quoting 12 C.F.R. § 7.4006.

The court of appeals next applied preemption principles to the state laws at issue. The court rejected Petitioner's contention that a "presumption against preemption" applies in this case, noting that "'an "assumption" of nonpre-emption is not triggered when [a] State regulates in an area where there has been a history of significant federal presence." Pet. App. 8, quoting *United States v. Locke*, 529 U.S. 89, 108 (2000). The court

observed that "[t]he regulation of federally chartered banks is indisputably such an area." Pet. App. 8 (citations omitted). Moreover, "'grants of both enumerated and incidental powers to national banks' are 'not normally limited by, but rather *ordinarily pre-empt*[ ], contrary state law.'" Pet. App. 8, quoting *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (emphasis added by court of appeals). Because the OCC's regulations "define the scope of the national banks' authority to conduct business through operating subsidiaries," and "undoubtedly these issues involve the 'incidental powers' of national banks," the court of appeals concluded there is no presumption against preemption in the circumstances of this case. Pet. App. 8-9.

Because "[t]he parties agree that the Maryland banking laws conflict with the OCC regulations," it follows that the Maryland laws at issue are preempted "unless the OCC 'exceeded its authority or acted arbitrarily.'" Pet. App. 9, quoting *de la Cuesta*, 458 U.S. at 153-54. In concluding that the OCC did not exceed its authority or act arbitrarily, the court of appeals applied the familiar *Chevron* framework. The court held that "Congress has not spoken directly about whether the OCC has authority to regulate operating subsidiaries." Pet. App. 10. The court concluded that "[t]he absence of any reference to operating subsidiaries in the Bank Act does not unambiguously provide that national banks may not create and perform banking functions through such entities." Pet. App. 10, quoting *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 959 n.12 (9th Cir. 2005).

The court further held that "the OCC's regulations are based on a permissible construction of the NBA." Pet. App. 10. The "'"business of banking"' is not limited to the enumerated powers in § 24 Seventh and . . . the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated.'" Pet.

App. 11, quoting *NationsBank*, 513 U.S. at 258 n.2. Here, "the OCC's regulation of operating subsidiaries does not exceed the limitations contemplated in *NationsBank*." Pet. App. 11. "'Allowing national banks to create, control, and delegate banking functions to operating subsidiaries provides some assistance to banks in performing their authorized activities.'" *Id.*, quoting *Wells Fargo*, 419 F.3d at 960. The court noted that the OCC limits the activities national banks can conduct through operating subsidiaries to activities that can be conducted directly by the bank. Pet. App. 11-12, citing 12 C.F.R. § 5.34(e)(3).

Finally, the court held that 12 C.F.R. § 7.4006, which provides that state laws generally apply to operating subsidiaries to the same extent that they apply to the parent national bank, "is reasonable and within the OCC's delegated authority." Pet. App. 12. The court of appeals found the OCC's reasoning "compelling": "'When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness.'" Pet. App. 12, quoting 69 Fed. Reg. 1904 (Jan. 13, 2004). The court of appeals concluded: "We join the Second, Sixth, and Ninth Circuits in finding the OCC did not exceed its delegated authority." Pet. App. 13.

ARGUMENT

There is no split in the circuits on the question presented by the petition. Every court – indeed, every single judge – that has considered the OCC's regulations has determined that they are valid. *See Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), affirming 334 F. Supp. 2d 957 (W.D. Mich. 2004); *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005), affirming 265 F. Supp. 2d 1162 (E.D. Cal. 2003); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), affirming 319 F. Supp. 2d 275 (D. Conn. 2004). In June 2006, however,

this Court granted the petition for a writ of certiorari in *Watters v. Wachovia Bank, N.A.*, No. 05-1342. The Court heard oral argument in *Watters* on November 29, 2007. Petitioner asks the Court to hold its petition in this case pending its decision in *Watters*.

Watters differs from this case in at least three respects. *First*, the petition in *Watters* presents two questions, rather than the single question presented in this case. The questions presented in *Watters*, as framed by the petitioner in that case, are: (1) "Is the interpretation of the Comptroller of the Currency that 12 CFR 7.4006 preempts Michigan's laws regulating mortgage lending as applied to State-chartered nonbank operating subsidiaries, entitled to judicial deference under *Chevron USA, Inc. v. Natural Resources Defense Council*?" and (2) "Does 12 CFR 7.4006, by equating a State-chartered nonbank operating subsidiary with a national bank for purposes of federal preemption of State regulation, intrude on State sovereignty in violation of the Tenth Amendment to the United States Constitution?" Pet. Br. in No. 05-1342, at i. The Petitioner in this case has not raised a Tenth Amendment issue, either in his petition for certiorari or in the courts below. Accordingly, the second question presented in *Watters* is not presented in this case, and provides no basis for holding the petition.

Second, this case differs from *Watters* in that Petitioner not only seeks to subject national bank operating subsidiaries to state licensing, examination, and enforcement provisions, but also to a substantive limitation on ARM prepayment fees. This limitation on mortgage fees clearly is preempted when ARM loans are made directly by national banks. *See* 12 U.S.C. § 371(a); 12 C.F.R. Part 34. Petitioner nevertheless contends that states are free to impose different substantive terms and conditions when a national bank makes a mortgage loan

through an operating subsidiary rather than when the national bank does so directly.

Third, while this litigation was pending, Respondents restructured their mortgage lending business, so that mortgage loans are now made directly by the parent national bank rather than through operating subsidiaries. At year-end 2004, Respondent First Franklin Financial Corporation was renamed First Franklin Financial Companies, Inc., and some of its assets were contributed to a new corporation (also named First Franklin Financial Corporation). Respondent National City Mortgage Co. was renamed National City Mortgage, Inc. In addition, on December 30, 2006, Merrill Lynch Bank & Trust Co., FSB purchased from National City Bank 100 percent of the issued and outstanding stock of the new First Franklin Financial Corporation. Merrill Lynch Bank & Trust Co., FSB is a federal savings bank rather than a national bank. Respondent First Franklin Financial Companies, Inc. remains in existence as a subsidiary of National City Bank, but the bank continues to make mortgage loans directly rather than through an operating subsidiary. These developments have complicated this case, making it an undesirable vehicle for resolving the question presented. Moreover, Respondents' decision to cease making mortgage loans through operating subsidiaries, and its sale of the assets of the former First Franklin Financial Corporation to a federal savings bank, have significantly narrowed the scope of the dispute between Petitioner and Respondents.

Despite these differences, there is a substantial overlap between the question presented by the petition in this case and the first question presented in *Watters*. Accordingly, the Court may wish to hold the petition in this case pending its decision in *Watters*.

CONCLUSION

The petition should be denied. Alternatively, the Court may wish to hold the petition pending its decision in *Watters v. Wachovia Bank, N.A.*, No. 05-1342, and then dispose of the petition as appropriate in the light of the decision in that case.

Respectfully submitted,

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